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Report To Congress

Decisional Delay in Wholesale Electric Rate Increase Cases: *Causes, Consequences and Possible Remedies*

By Charles B. Curtis, Chairman
Federal Energy Regulatory Commission

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A Report Submitted to the Congress,
Pursuant to Section 207(b) of the
Public Utility Regulatory Policies
Act of 1978.

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CHAPTER I

I. BACKGROUND.

Like other laws relating to public utilities, the Federal Power Act is drawn on the premise that, in the business of transmitting and selling electric energy, market forces must be supplemented by governmental controls. 1/

Accordingly, the Act requires that the prices at which electric energy is sold for resale in interstate commerce be "just and reasonable." 2/ It says that "any [emphasis added] ...rate or charge that is not just and reasonable is hereby declared...unlawful." 3/ Discriminatory rates are also banned. 4/

1/ Part II of the Act, which is captioned "REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE", begins as follows: "It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation...of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." Section 201(a), 16 U.S.C. § 824(a)(1976). The Federal Power Act today is essentially unchanged from that adopted by the Congress in 1935.

2/ Federal Power Act §205(a), 16 U.S.C. §824(a) (1976).

3/ The quotation is from the last sentence of the section of the Act cited in the preceding footnote.

4/ Federal Power Act §205(b), 16 U.S.C. §824(b) (1976).

From 1935 to 1977 the Federal Power Commission was responsible for seeing to it that wholesale electric rates met these standards. The Department of Energy Organization Act of 1977 transferred that function to the Federal Energy Regulatory Commission, an independent regulatory agency within the Department of Energy. 5/ In a strict, technical sense the latter Commission is not a mere successor to the old Federal Power Commission; there are some important differences between the two agencies.

But those are of little moment for present purposes. Hence in this report the term "Commission" will often be used interchangeably for both agencies. When used with respect to the period before October 1, 1977, the date on which the Federal Power Commission ceased to exist, the word "Commission" refers to that body. When used with respect to a time after October 1, 1977, the word "Commission" refers to the present Federal Energy Regulatory Commission.

5/ Section 401(a) of that Act, 42 U.S.C.A. §7171 (West Supp. 1978). See also Executive Order No. 12009, 42 Fed. Reg. 46267 (1977).

CHAPTER II

II. WHAT IS THE PROBLEM?

In recent years it has become apparent that the Federal Power Act's rate regulatory objectives were not being fulfilled. The actual rates paid for wholesale service were excessive. They remained in effect for long periods of time. Notwithstanding an express statutory direction to expedite rate hearings and decisions, 6/ many cases at the Commission were taking three to four years to reach conclusion; some even longer.

In instances too numerous to ignore there has been (and continues to be) a yawning chasm between legal requirement and economic reality.

That marked discrepancy between the law in the books and the law in action has evoked strong complaints from the wholesale customers whom the Act was designed to protect. It also has drawn the protest of the regulated utilities. Those whom the Act seeks to restrain are seldom in accord with those whom it seeks to protect. Indeed, there is a marked antagonism between the two sides. That antagonism has much to do with the troubled and litigious state of this field.

But both sides find serious fault with the Commission's performance. Both complain of inordinate decisional delay; both

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6/ Federal Power Act §205(e), 16 U.S.C. §824(e) (1976).

can point to instances where they have been harmed by the Commission's chronic inability to reach timely decisions.

That consensus and its serious public policy implications led to Section 207(b) of the Public Utility Regulatory Policies Act of 1978, which reads:

> "The chairman of the Federal Energy Regulatory Commission, in consultation with the Secretary, is directed to conduct a study of the legal requirements and administrative procedures involved in the consideration and resolution of proposed wholesale electric rate increases under the Federal Power Act for the purposes of (1) providing for expeditious handling of hearings consistent with due process, (2) preventing the imposition of successive rate increases before they have been determined by the Commission to be just and reasonable and otherwise lawful, and (3) improving procedures designed to prohibit anticompetitive and unreasonable differences in wholesale and retail rates, or both. The chairman shall report to Congress within 9 months from the date of enactment of this Act on the results of the study required under this section, on the administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid the purposes of this section."

This report is submitted pursuant to that direction.

Even prior to Congressional adoption of Section 207, the Federal Energy Regulatory Commission recognized that the house it inherited needed repair and rehabilitation. Several concrete steps were taken to begin the reformation of the decisional mechanisms that it inherited from the Federal Power Commission. Many people who know the Commission and its work have assisted in the wholesale electric rate phase of that effort.

Contributions of varying degrees of formality have been

made by present and former members of this Commission's staff, by representatives of the regulated wholesalers and their wholesale customers, and by other interested persons. This report draws deeply from their combined experience and counsel.

Of particular note is the work of a subcommittee of the Commission's Advisory Committee on its Rules of Practice and Procedure. That group, the Subcommittee on the Review of the Decisional Process (called the "Stelzer Subcommittee" after its Chairman, Dr. Irwin Stelzer, and populated chiefly though not exclusively by lawyers), made a comprehensive review of the Commission's wholesale electric rate practices and procedures. The Stelzer Subcommittee brought a much needed fresh look to this whole area. Its report to the Commission is a seminal and a provocative document. In addition, the Subcommittee on Filing and Substantive Regulatory Requirements tendered valuable recommendations concerning areas suitable for generic rulemaking and revisions to the Commission's filing requirements. 7/

Together, these subcommittees provided the Commission with a broad array of suggestions for improving the management of its electric rate case load.

7/ This Subcommittee is co-chaired by George F. Bruder and Richard A. Rosan. The recommendations concerning electric matters were developed in large part by George F. Bruder and Alan J. Roth. This report also draws on a series of workpapers prepared for the Advisory Committee's Subcommittee on the Hearing Process, chaired by Mr. Roth. The documents submitted by the two subcommittees are available in the Commission's Division of Public Information.

CHAPTER III

III. THE STATUTORY ROOT OF THE PROBLEM: THE PROCEDURAL HISTORY OF A WHOLESALE ELECTRIC RATE INCREASE CASE.

A wholesale electric rate increase case begins when a wholesale supplier of electric power decides that it must charge more for electric service.

The utility implements that decision by notifying the Commission and the public of the proposed change. The Federal Power Act provided for a 30-day notice period. 8/ This has recently been increased to 60 days. 9/

During the notice period the Commission has to decide whether the filing presents questions that warrant a hearing. 10/ If it sees none, the increase becomes effective at the end of the notice period. 11/ If the Commission finds questions that warrant exploration, it:

(A) Orders a hearing on the lawfulness of the proposed rate; and

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8/ Federal Power Act §205(d), 16 U.S.C. §824(d) (1976).

9/ Section 207(a) of the Public Utility Regulatory Policies Act of 1978 effected that change.

10/ When the filing is patently devoid of merit on its face, the Commission can reject it.

11/ "For good cause shown", the Commission may permit the increase to go into effect before the notice period ends. The last sentence of §205(d) of the Federal Power Act 16 U.S.C. §824(d) (1976), authorizes such acceleration.

(B) Suspends the operation of that rate

"pending such hearing and the decision thereon." 12/

However, the Commission cannot suspend "for a longer period than five months beyond the time when it [the rate] would otherwise go into effect." 13/

So, after five months the utility can begin to collect the increased rate. That is so even if that rate seems excessive on its face and even if it is far higher than anything that the Commission would be likely to award after a hearing. 14/ Thus unreasonable rates can lawfully be collected for lengthy periods in spite of the statutory prohibition declaring them "unlawful".

True, the excessive portion of the rate is ultimately refunded with interest. But this does not mean that the rate then in effect will finally meet the statutory standard, or that the rates will even be reduced following refund. This is so because the utility is permitted to file for successive rate increases without awaiting a disposition of an earlier application. This stacking of one unadjudicated rate increase on top of another is known in the trade as "pancaking". Because of pancaking, many years can go by during which the rates actually paid exceed those that the Commission ultimately

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12/ Federal Power Act §205(e), 16 U.S.C. §824d(e) (1976).

13/ Ibid.

14/ The Commission's power to reject filings operates as a rudimentary check on those that are grossly out of line.

deems just and reasonable. 15/ Excessive past rates are refunded. But this does not cure the excessiveness of the present rate. 16/

One unfamiliar with the field might respond that this means that the Commission ought to conclude these cases within five months. If it does that, consumers will never pay an unjust rate. They will pay only that which the Commission finds just and reasonable. There will be no such thing as "pancaking".

Under this view the five-month cap on the duration of the suspension is simply a goad to expedition. This position can be bolstered by pointing to the last sentence of Section 205(e) of the Act, 17/ which reads:

> At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. (Emphasis added.)

15/ For a hypothetical case illustrating how this works, see this Chapter, infra.

16/ There are a number of vivid examples of pancaking which can be culled from the Commission's files. In one such case, from 1971 through late 1979, customers paid rates under nine successive pancaked filings. At no time during this entire nine year period were the rates being collected approved by the Commission.

17/ 16 U.S.C. §824(e) (1976).

But wholesale electric rate cases are complicated. They turn on nice questions of judgment about which experts disagree. 18/ These are strongly contested. The parties normally present their positions at length. That takes time. And it produces weighty records. 19/

The records of these proceedings have to be analyzed and pondered. That is done in the first instance by the administrative law judge who heard the case. 20/ The judge has to produce an initial decision 21/ stating the judge's "findings

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18/ This is as true of the experts in the Commission's employ as it is of those who earn their living in other ways.

19/ For example, the record in the Commonwealth Edison case, discussed infra, fills 21 volumes. Briefs to the Commission alone contained 702 pages.

20/ The text reflects present practice. That process is governed by the Administrative Procedure Act provisions with respect to "adjudication". See 5 U.S.C. §§556, 557 (1976).

However, the Commission is also authorized to use so-called "rulemaking" procedures in its work. See Section 403 of the Department of Energy Organization Act, codified in 42 U.S.C.A. §7173 (West Supp. 1978). The possibilities that this opens up are discussed in Chapter VII.

21/ The parties can waive this step. Even if they do not do so, the Commission can direct that the initial decision be omitted. However, omission by order of the Commission, as distinguished from omission by consent of the parties, must be supported by a finding that "due and timely execution of its [the Commission's] functions imperatively and unavoidably so requires." 5 U.S.C. §557(b)(2) (1976). Nevertheless, initial decisions are almost never dispensed with in wholesale electric litigation. Litigants seldom waive that step. And the Commission has been loath to order its omission.

and conclusions, and the reasons or basis therefor on all [emphasis added] the material issues of fact, law, or discretion presented in the record." 22/ Consequently, the decision cannot be produced quickly; it is usually long and elaborate. But it very infrequently ends the matter. Normally, it is just the first round.

Under applicable procedures, the Commission must allow the parties an opportunity to submit "exceptions to the decisions" of its administrative law judges. 23/ Almost invariably the opportunity is taken. Often everyone involved in the case appeals.

Voluminous briefs are filed. Typically the Commission allows a double round of briefing. This means that the appel-pants file briefs in support of their exceptions and that the appellees file briefs opposing those exceptions. At this juncture the analytical process begins anew. The Commission may conclude by summarily affirming the judge's initial decision. That seldom happens. Usually, a new opinion is constructed.

And as was the case with the initial decision, the Commission's opinion must itself state the "findings and conclusions, and the reasons or basis therefor on all [emphasis added] the material issues of fact, law, or discretion presented in

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22/ 5 U.S.C. §557(c) (1976).

23/ Ibid.

the record." 24/ Unless the Commission is willing or able to stand on the judge's decision, 25/ its opinion is likely to require considerable time for its development.

Following the issuance of a formal opinion of the Commission, an opportunity for rehearing must be provided. 26/ Again, the usual practice is to accept the invitation and file for rehearing. Often, (much too often in my view) "rehearing" is granted. This means that yet another opinion must be fashioned. 27/

24/ Ibid.

25/ The Commission's function is appellate. As in the case of other appellate tribunals, the expedition with which the appellate process works depends in large measure on the standard of review by which the appellate adjudicators guide themselves. If they treat the proceedings below as a mere dress rehearsal for the real show to be performed before them and if they insist on a meticulous rehashing of every aspect of every case, their decisional pace will be slow. If the appellate tribunal's docket is as heavy as this Commission's is, mountainous backlogs are inevitable. The pace of decision will accelerate and those backlogs will fall if the appellate body focuses on points of real substance, applies a "harmless error" rule, requires the appellant to demonstrate that the decision below is either clearly erroneous or of considerable general significance, and writes opinions only when it has something to say that is really worth saying. Up to now the Commission has followed the first course. I propose to switch to the second. Unless that switch is made, the outlook for progress is dismal.

26/ Federal Power Act §313, 16 U.S.C. §825(a) (1976).

27/ Should the Commission materially modify its original decision, another opportunity to seek rehearing may present itself. And so it goes.

The Commission's processes involve three wholly separate decisions. The first is the staff's preliminary analysis of the applicant's costs, including its so-called "cost of capital". These analyses in their earliest form serve as a basis for the Commission's determination whether to accept a rate increase or suspend it and put the matter down for hearing. The analyses are further modified ultimately becoming what is known as Staff's "top sheets". The second decision is the administrative law judges's initial decision. The third is the Commission's own decision.

Even the run-of-the-mill case under this process takes upwards of two years to complete from filing to Commission decision. Where the issues are particularly difficult, or the procedural snarls densely tangled, the time required for decision escalates to something close to four years. 28/

28/ In Fiscal Year 1977 the average interval between the initiation of a wholesale electric rate case and the issuance of a Commission opinion was about 40 months. FY 1978 showed some improvement. Even then, however, the average wholesale electric rate case in which the Commission issued an opinion was about 30 months old when the opinion came down. Remember that these figures are averages. This means that many cases took much longer. Note should also be made of the fact that no account has been taken of rehearings and reconsiderations. The figures in this footnote refer only to the periods required for the issuance of the Commission's first decision. Had account been taken of rehearings and reconsideration and had an effort been made to measure aggregate decisional time by comparing the date on which the last "i" was dotted and the last "t" crossed to the date on which the proceeding began, a darker picture would emerge.

There are notable instances in which it has taken the Commission even longer than that to dispose of a wholesale electric rate case.

Some of the steps traditionally taken in this decision process can and should be eliminated. The time now allowed for others can and should be shortened. Effective management can do more, much more.

Better advocacy also would make for speedier as well as for better adjudication. The Commission could and would work much faster than it does if the briefs and the records with which it struggles were shorter, clearer, more sharply focused, and better organized than they are. Less adversarial passion would help us to see better the substance of the case.

Even under ideal conditions, however, I do not see how any appreciable number of wholesale electric rate cases could ever be disposed of within five months save through the settlement process.

It seems to me that the people who wrote the Act back in 1935 realized this. To begin with, they did not impose a five month or any other deadline. Secondly, they were familiar with the then state of the regulatory art. In 1935 applicable legal precedent held that regulated entities had a constitutional right to a fair return on the "fair value" of their properties. 29/

29/ The leading case was Smyth v. Ames, 169 U.S. 466 (1898).

So regulatory bodies had to determine what "fair value" was. To do that, they had to inquire into the cost of reproducing the facilities. 30/ Those investigations were often criticized as conjectural, speculative, and inordinately time-consuming. 31/

30/ See e.g., McCardle v. Indianapolis Water Co., 272 U.S. 400 (1926).

31/ See Mr. Justice Brandeis's classic dissent in Southwestern Bell Tel. Co. v. Public Serv. Comm'n. of Mo., 262 U.S. 276, 289 (1923).

> Writing around the time that the Federal Power Act's rate regulation provisions were enacted, the future Mr. Justice Frankfurter, then a teacher of public utility law and one of the principal architects of the Public Utility Act of 1935, observed of the doctrines then deemed controlling that:
>
> > "The consequence has been in every important ratefixing proceeding, a preoccupation lasting sometimes for years, with contention over fanciful elements in quest of a rate base.... This procedure has entailed an incredible waste of time and money ....Thus in a leading valuation controversy in New York over telephone rates the litigation began before a commission in 1920 and went its snail-like pace through the federal court until 1930. Half a dozen estimates of value--by the commission, the master appointed by the court itself and the company's experts, all purporting to apply the Supreme Court's formula ranged between $366,000,000 and $615,000,000. A similar case in Chicago was in the federal courts for more than ten years and had not been concluded at the end of 1933. In the latter case it cost $25,000 [it must be remembered that those were not the dollars of today, they were Gold Standard-Depression era dollars] to print the record of the proceedings for review by the Supreme Court. The whole process is fundamentally an elaborate fiction. In the end rates are fixed which reflect no other reality than that of compromise, reinforced partly by the superior advantage of the utilities in litigation."

(Footnote continued on next page.)

The historical record shows that the Congress of then, which was preoccupied by utility problems, was well aware of that.

31/ (Footnote continued from previous page.)

Frankfurter and Hart, Rate Regulation in 14 Encyclopedia of the Social Sciences. (1937).

In the late 1930's and in the early 1940's the Commission made a strenuous effort to free regulation from these costly and by then time consuming rituals. That effort successfully culminated in Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944). Hope freed the regulatory process from the need to determine the "real", "true" or "fair" value of utility properties.

However, the rituals of yore have been replaced by new rituals. These relate to rate of return methodology and to cost allocation techniques. Unlike the rituals of old, those of today are not judicially mandated. Nevertheless, they have become as costly and as protracted as the search for "fair value". One economist has spoken of "a new form of Roman holiday -- long-drawn-out, costly, confusing, expert-contrived presentations in which the simple directions of the ... cases [referring to Hope and to the famous 1923 case of Bluefield Water Works & Improvement Company v. Public Serv. Comm'n. of West Virginia, 262 U.S. 679 (1923) in which a unanimous Supreme Court at page 692 said that "A public utility is entitled to such rates as will permit it to earn a return on the ... property which it employs for the convenience of the public equal to that generally [emphasis added] being made at the same time ... on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures".] are turned into veritable witches' brews of statistical elaborations and manipulations." Professor Ben W. Lewis in Shepard and Gies, eds. Utility Regulation: New Directions in Theory and Practice 242-243 (1966). Writing a few years after Professor Lewis, and quoting from him, Professor Alfred E. Kahn observed that "As regulatory attention has turned from the rate base to the rate of return, and the latter has become less and less an essentially conventional 6% or so, the litigants have become increasingly skilled and assiduous in developing prolonged, complex, and inconclusive testimony about the proper measurement". 1 A. Kahn, The

(Footnote continued on next page.)

It made express provision for cases in which the proceeding took more than five months. The utility could collect the increase. But the Commission was authorized to require refunds.

The architects of this scheme had to strike a balance among competing social interests. The interest in expedition clashed with the interest in full inquiry and with administrative exigencies. The social interest in the financial viability of utilities supplying an essential public service and hence in a regulatory system that would enable the wholesalers to raise their rates in relatively short order, when necessary, collided with the social interest in seeing to it that rates were always "just and reasonable".

The balance could have been struck in various ways. The way in which it actually was struck was shaped by history. In this area, as in others, the draftsmen looked to the Interstate Commerce Act. There the Congress had opted for a suspension period of a few months after which the carrier could collect the increased rate subject to refund.

31/ (Footnote continued from previous page.)

Economics of Regulation 41 (1970). Lawyers and economists are ingenious. And today's inflation-dominated economic climate places a premium on inquiries of this character. Hence rate of return litigants have become even more skillful and even more assiduous than they were in 1970, when Professor Kahn wrote. So rate of return testimony keeps growing more prolonged and more complex. That increase in prolixity and in complexity makes these inquiries even less conclusive and even more conjectural than they used to be. And, of course, the bulkier the records grow and the longer the briefs become, the greater the time required for decision.

The decision to look to the Interstate Commerce Act's rate increase provisions may have made good sense in 1935. The dollar was appreciating or stable. So a 1938 refund of an excessive rate collected back in 1936 was a more adequate remedy.

In any event rate increases were a secondary problem. The nation and the world were mired in the depths of the Great Depression. Requests for increases were rare. The regulators' task was to force utility rates down so as to bring them into line with the deflated prices and costs that marked the economic history of that era.

The scheme that seemed, and probably was, well-suited to the needs of the 1930's may be ill-suited to the wholly different economic climate of the eighties. 32/

In an age of inflation there are some serious questions about the adequacy of a kit of regulatory tools that consists primarily of the discretionary power to suspend for a period that can in no event exceed five months and of the authority to order refunds with interest. To make those questions vivid, I offer a wholly hypothetical case involving a wholly hypothetical chronology about an equally hypothetical electric company:

32/ When the Act was written, most wholesale transactions involved buyers and sellers that were under common control. Since the buyer and the seller were really one and of the same, there was little need to worry about the detrimental effect that a rate increase might have on the buyer. The concern was with the buyer's resale customers.

MARCH 1, 1976 -- The XYZ Electric Company files for a 17% increase in its wholesale rates. The affected customers protest the increase as excessive. The Commission's staff also considers it excessive. But XYZ obviously needs some additional revenue and its needs are immediate. So, acting on the staff's recommendations, the Commission suspends the increase for only a single day so as to preserve the customers' right to refunds in the event that a portion of the increase is ultimately found excessive.

MAY 1, 1976 -- XYZ begins to collect its increased rates--subject to refund. XYZ now has a rate case before the Commission. Let us call that Case I.

JANUARY 2, 1977 -- XYZ files for another increase. It wants another 20%. Once again the customers protest. This time the staff thinks XYZ's request unjustified. Accordingly, it recommends that the increase be suspended for the maximum period of five months. The Commission agrees. So Case II begins.

AUGUST 1, 1977 -- XYZ's second increase goes into effect. The rates involved in Case I, which is still being tried before an administrative law judge, are superseded.

FEBRUARY 1, 1978 -- Cases I and II are still pending. But XYZ thinks it needs more revenue. Hence it makes a third filing. Here the script repeats itself. So Case III is superimposed or "pancaked" on Cases I and II.

SEPTEMBER 1, 1978 -- The increases involved in Case III go into effect.

FEBRUARY 1, 1979 -- Once again XYZ deems itself entitled to an increase. So it makes a fourth filing. Now we have Case IV.

APRIL 1, 1979 -- The Commission issues its decision in Case I. It finds XYZ's rates excessive and orders substantial refunds. But that finding and those refunds relate only to the so-called "locked in period" involved in Case I, viz: May 1, 1976 to July 31, 1977. Hence the Commission's action has no impact on the rates actually in effect (although the refunded amounts help to offset the economic consequences of those rates).

SEPTEMBER 1, 1979 -- The Commission decides Case II. It finds the rates there involved "grossly excessive". This time substantial refunds are ordered. But those refunds relate only to the "locked in period" from August 1, 1977 to August 31, 1978. Case III is still being litigated before the administrative law judge. And Case IV is just about to get under way before another judge.

But on this very day the increases involved in Case IV go into effect because the suspension period is over. That is so even though XYZ's Case III has yet to be adjudicated.

Note that all through these years the customers have <u>never</u> paid a rate that the Commission has found just and reasonable. The rate in effect at any given point in time has been determined unilaterally by the company. What we have here is a spiral of successive rate increases punctuated by a refund whenever the Commission reaches a final decision.

The picture that emerges is one of a perverse mechanism that enables XYZ to force its wholesale customers to lend it money. Moreover, XYZ can arrange matters so that the "loans" are not repaid (at least for a long, long time). It is even theoretically possible for XYZ to so structure its filings so as to ask for enough to cover the refund obligations that they anticipate as a result of the Commission's decisions in earlier cases. 33/

The long and the short of this account is that:

(A) XYZ is able tc effectively set its own wholesale prices; and

(B) The protection that its customers actually get from the Federal Power Act is quite limited. 34/

33/ Here, one safeguard of the current system may come into play. If the filing is plainly unjustified the Commission has asserted the authority to reject it. There have been instances where it has successfully done this in the past.

34/ However, it does not follow that this state of affairs is an unalloyed blessing for XYZ or for the holders of its securities. XYZ's contingent refund liabilities to its wholesale customers and the questions that those liabilities engender about the quality of XYZ's earnings detract from the appeal of its securities. If XYZ's wholesale business is small when viewed in relation to its total revenues, the negative effect will be small.

Suppose, however, that XYZ's wholesale business is substantial. In that event investors will perceive XYZ as somewhat riskier than other companies similarly situated but unembarrassed by contingent liabilities arising under the Federal Power Act. This means that:

(A) XYZ's outstanding securities decline. That hurts the people who have committed their savings to those securities. An XYZ bond that would otherwise sell at par drops to 98. And XYZ's stock goes from 20 to 19.

(Footnote continued on next page.)

XYZ is imaginary. Its fictitious history shows what can happen. It also shows that the syndrome of which Congress spoke in Section 207(b)(2) of the Public Utility Regulatory Policies Act--"the imposition of successive rate increases before they have been determined by the Commission to be just and reasonable and otherwise lawful"--is rooted in the statutory scheme.

Cases such as the one that I have just posed were academic in 1935. They remained academic for decades. 35/ But they have not been academic in recent years. Nor are they academic today.

The extent to which such cases actually occur in practice and the gravity of the hardships that they cause depends on the rate of inflation, the acuteness of the wholesalers' need for additional revenue and the dispatch with which the Commission is able to dispose of its adjudicatory business. These factors interact with each other. When economic conditions (such as those experienced over the last decade) lead to

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34/ (Footnote continued from previous page.)

> (B) XYZ has to pay more than it otherwise would to attract new capital. So its capital costs rise. Since capital costs figure so prominently in the total cost of service, XYZ's rates must also rise. That will be true of both retail and wholesale rates. Thus everyone who uses XYZ-generated electricity has to pay a bit more for it than it would be necessary if XYZ were free from contingent liabilities to its wholesale customers.

35/ See Chapter V.

a flood of electric rate increase filings, situations that resemble XYZ's are largely unavoidable.

Managerial and administrative reforms can help. But they cannot cure. The cure, if there is to be a cure, must come from the Congress. Hence it may wish to reassess the balance that the 74th Congress struck back in 1935. 36/

36/ Chapter IX speaks to this point.

CHAPTER IV

IV. SPECIAL FEATURES OF WHOLESALE ELECTRIC RATE REGULATION

The typical wholesale electric rate case involves a large investor-owned utility that sells power at wholesale to a distribution system or a group of distribution systems. 37/ Most of these distribution systems are municipally or cooperatively owned. These publicly owned systems, commonly referred to in the industry as "munis" and "co-ops", most often depend on the investor-owned wholesalers for all or most of the power that they resell. 38/

The transactions between the wholesalers and their customers take place in what is called the bulk power market. This is the wholesale market in which electricity is sold for resale. That market is becoming more competitive than it used to be.

Distributors formerly viewed themselves as more or less tied to particular bulk power suppliers. Today, however, they are prone to shop around among competing suppliers. And many

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37/ The word "large" calls for a bit of a gloss. The Commission regulates about 215 wholesale sellers of electric energy. Not all of them are giants. Many are quite small when compared to the industry's leaders. But even these small companies are almost invariably far larger than the retail distributors that buy power from them.

38/ Those that have access to such publicly owned facilities as the Tennessee Valley Authority and the Bonneville Power Authority buy from them. But the rates applicable to these transactions are not subject to the Commission's regulation under Part II of the Act. 16 U.S.C. §824(f) (1976).

of them are no longer content to depend on others for their bulk power. They want at least a measure of independence. Some of them are achieving this objective by joining with each other and/or with investor-owned companies for the purpose of acquiring ownership interests in generating plants and transmission facilities.

These developments are important. They may become much more important in the future. Nevertheless, most publicly owned systems are still very much dependent on investor-owned wholesalers. And this dependence will probably endure for some time to come.

Investor-owned wholesalers are not mere wholesalers. They are also retailers. Indeed, they are primarily retailers. At the retail level they often are in competition with their own wholesale customers.

That competition may take several forms. One could involve competition for new or expanding industrial and commercial business. Suppose that the City of A has a municipally owned electric system. That system will seek new business, just as a profitmaking enterprise would. 39/ And the City's officials will normally be eager to attract industries that use power, create jobs, and pay taxes. But the B Power and Light Company from which A's

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39/ Though the city does not operate the system for private profit, it may look to it for revenue that it uses to defray general governmental costs.

municipal system gets its power is also interested in new industrial and commercial business. Since A and B are neighbors, it may be the circumstance that a company interested in the general area can choose between a site served by the municipal system and one served by its investor-owned supplier-competitor.

The price of electric service may be a determinant factor for price-conscious, large-scale users of electric power. If City A has no alternative wholesale supplier other than B, B's pricing in the wholesale market could act to "squeeze" the city out of competition in the retail market for industrial and commercial loads. Price squeeze allegations figure prominently in this field. 40/

Another form of retail competition involves situations in which a residential, commercial, or industrial customer can choose between an investor-owned utility and another that is municipally or cooperatively owned since the customer is located on the borderline between the two. In either case the power that the customer uses is generated by the investor-owned company. But the customer has a choice between distributors. He can buy directly from the investor-owned company. Or he can buy from the publicly-owned distribution system.

40/ See Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976). See also Chapter VIII, infra.

In this connection I should point out that publicly-owned entities seldom have the franchises conferring the exclusive right to serve a given area that the private companies get from the state commissions that regulate them. This lack of exclusivity creates some problems for the public entities. But it also enables them to expand their service areas. Hence, they can sometimes lure customers away from the private companies. Private companies are seldom able to compete with each other in that fashion. So the public systems sometimes have a unique competitive potential. 41/

Even more significant is a phenomenon known as "franchise competition." If A had no municipal electric system, the retail business that now goes to that system would go to B Company. Now suppose that the Company's retail rates are lower than the City's. That will normally lead the City's people to wonder whether their municipally owned electric system is worth it.

If the Company's rates are appreciably lower or its service appreciably better than the City's, the municipality will probably give up the struggle by selling out to the Company. And, of course, what the municipal system charges depends, in part, on B's wholesale pricing.

Moreover, A's municipal system is a threat to the Company. Customers in the company's retail service area will compare

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41/ Moreover, some states have annexation laws which permit municipal governments to grow by annexing contiguous areas. Therefore, the municipal electric system can add large numbers of customers in single steps.

its retail rates with those paid by the citizens of A. 42/ If A's people have lower rates, better service, or both, other cities in B Company's service area may opt for municipalization. Should that happen, the B Company will lose much remunerative business. 43/

It is obvious that there can be damage to these forms of retail competition unless the prices at which the publicly owned systems buy their power are fair. If those prices are too high, competition for individual customers and for franchises is impaired. If they are too low, the companies' retail customers will be subsidizing their wholesale customers.

So a wholesale electric rate case is both a dispute between competitors and a dispute between a buyer and a seller. These tend to be bitter. In electric power that bitterness is exacerbated by the fact that one side usually depends for its existence on fair treatment from the other Ideological feuds of long standing add to the tension.

42/ Of course, investor-owned utilities point out that their municipal and cooperative rivals enjoy tax advantages that tend to distort (and, in the investor-owned companies' view, to invalidate) this comparison.

43/ Even in places that do not have public power, the threat of its arrival is a potent competitive factor. Some think it the only real competitive factor so far as the ordinary consumer is concerned. Conversely, the ever-present threat of demunicipalization keeps public power managers on their toes and checks the tendencies to bureaucratic inertia endemic to governmental operations.

These battles are fought with the aid of able and ingenious lawyers who specialize in this corner of Federal regulation. What looks like economic democracy to the friends of public power looks like unfair, tax-exempt and sometimes tax-supported competition to its private sector adversaries. The investor-owned companies are not enthusiastic about being undersold in their own service areas with their own power. From their perspective, their publicly owned competitors are "eroding" the privately owned systems' clientele with the privately owned systems' own facilities. 44/

This situation gives special meaning to the term "adversary proceeding". When the two sides litigate with each other over rates, they are often militant, well armed, and ready for a protracted struggle.

Thus the social context in which the Commission's wholesale electric cases arise is altogether different from the one in which the state commissions function when they regulate retail rates.

44/ See Mr. Justice Stewart's dissent in Otter Tail Power Co. v. United States, 410 U.S. 366, 382 at 388, et seq. (1973).

CHAPTER V

V. HOW AND WHY THE WHOLESALE ELECTRIC RATE INCREASE PROBLEM BECAME SO ACUTE?

Most of what has been said up to now has been true for a long time. The legal structure under which rate increases become effective before the Commission has had a fair opportunity to pass on them and that permits the imposition of one such unadjudicated increase after another has been in place since 1935. The public power versus private power controversy is of even older vintage.

And laments about the "law's delay" were an old story when Shakespeare put them into Hamlet's mouth. 45/ Indeed, the hope that expert bodies would be able to move faster than the allegedly tradition-bound courts was one of the factors that led to the proliferation of administrative agencies. That hope has been unfulfilled. Administrative delay has been even more chronic and even more vexatious than judicial delay. 46/

45/ Historians tell us that Shakespeare had been a litigant. If so, he knew whereof he spoke. Should those who believe that the plays were in fact written by Lord Bacon be correct, the point would be even clearer. Bacon, a lawyer and a judge, was at home with the legal process.

46/ Twenty years ago a distinguished Court of Appeals judge, who had practiced extensively before the agencies prior to his ascent to the bench and who knew both the agencies and the courts at first hand, wrote: "I wonder whether law students still are taught, as we were, to contrast the celerity of those Mercury-like and wing-footed messengers, the administrative agencies, with the creeping and cumbersome processes of the Courts." Friendly, A Look at the Federal Administrative Agencies, 60 Colum. L. Rev. 429 (1960).

This has long been so at the Commission. In 1960, the late Dean Landis reported to the President-Elect that "[i]nordinate delay characterizes the disposition of adjudicatory proceedings before substantially all of our regulatory agencies", 47/ and that "[t]he Federal Power Commission without question represents the outstanding example in the federal government of the breakdown of the administrative process." 48/

But that breakdown was a breakdown in the administration of the Natural Gas Act. 49/ Electric rate delay was not viewed as a problem. Indeed, Dean Landis made no mention of electric rates. The Commission had many other vociferous critics. So far as I can find, however, none of them indicted it for delay in electric rate matters.

47/ Staff of Senate Comm. on the Judiciary, 86th Cong., 2d. Sess., Report on Regulatory Agencies to the President-Elect, 5 (Comm. Print, December 1960).

48/ At page 54 of the report cited in the preceding footnote. Pages 54 to 58 of that document are replete with scorching criticisms of the Commission's "patent failures" and of "delays . . . terribly costly to the public and . . . productive of unemployment in other basic industries."

49/ Some months before Dean Landis submitted his report, the Commission itself observed that "[i]f our present staff were immediately tripled, and if all new employees would be as competent as those we now have, we would not reach a current status in our independent producer rate work until 2043 A.D. -- eighty-two and one half years from now. Of course, we could expect to improve our techniques and thus shorten the time required to process these cases. If we increased our efficiency one thousand percent, we would achieve current status in 1968 -- eight and two tenths years from now. And regardless of how much our staff is increased, every case must still be reviewed by us, and our own time and capacity is not unlimited." Phillips Petroleum Company, 24 F.P.C. 537, 546 (1960).

What changed? And why? Why was the processing of wholesale electric rate increases a non-problem until the late 1960's? And what has made it so horrendous a problem in recent years?

To answer these questions we have to look at a complex of technological, legal, and economic developments.

Let us begin with technology.

In 1935, and for many years thereafter, small-scale generating plants were still economically viable. Hence, publicly owned systems were self-sufficient in the main. So, wholesale electric rate cases of the type that now crowd the Commission's docket were few and far between.

After the end of the Second World War, quantum advances were made in the technology for transmitting electric energy over long distances. 50/ Other changes in the state of the electrical art led to an enormous and a progressive increase in the size of generating units. The optimum size of generators escalated. The public systems generally were too small to avail themselves of the tremendous economies of scale that now became available. Purchased power even if it had to be purchased at high prices was cheaper than self-generation. Technology thus forced the public systems into the general state of dependence on the large investor-owned companies in which they now find themselves.

50/ See generally, Congressional Research Service, 95th Cong., 1st Sess., Report on National Energy Transportation (Comm. Print 1977).

I turn to the legal aspects. Suppose that controversies of the kind that now account for the overwhelming majority of the Commission's wholesale electric caseload had been frequent in 1935. They would not have come to the Federal Power Commission.

About 80% of the electric rate cases that now come before the Commission involve situations in which the seller, the buyer, and the buyer's retail customers are all in the same state.

When we talk about the "wholesale electric rate problem" today, these are the cases with which we are concerned. Is the seller taking advantage of the buyer? How can the buyer be shielded from the seller's monopolistic power without imposing an unfair burden on the seller's retail customers?

The wholesale electric rate problem of 1935 did not turn on these issues. In 1935, and for many years thereafter, the wholesale electric problem was a facet of the bigger problems involved with holding company control. During the 1920's, electric power and natural gas had come to be dominated by giant interstate holding company systems. 51/ A distinguished

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51/ One of them, the Electric Bond & Share Co., operated in 32 States. Electric Bond & Share Co. v. SEC, 303 U.S. 419, 432 (1938).

student of the subject summarized the results of holding company domination this way:

> The first point to note about these holding companies is that, defying the principles of regional planning and of engineering integration, they took under their control utility properties scattered all over the face of the map--including, in a few cases, the map of foreign countries as well as of the United States. They thereby quickly attained tremendous size without possessing a well-designed form necessary to prevent this size from becoming seriously unwieldy. The second point is that in their rivalry with each other to buy up properties they paid exorbitant prices in cash or in securities--prices on which there was no hope of earning an adequate return, except, perhaps, through a levy of extortionate rates upon their customers. The third point is that, not being in themselves public utilities and hence being free from any regulation of their securities, they issued grossly excessive amounts of stock and pyramided layers of holding-company debt on top of layers of operating-company securities, thereby causing their own stock to represent a dangerously thin equity. And the fourth point is that they formed service companies to do management, financing, and construction work for their own subsidiaries at unwarranted profits to the holding-company treasury. In these practices the holding companies had the hearty support of the great Wall Street banking houses, which derived fortunes from their financial operations. They also had the support of leading engineering firms, which controlled several holding companies . . . for the sake of creating and retaining profitable customers for engineering service. 52/

To the four counts in the foregoing indictment a fifth was coupled. The holding company device was an ideal way in which to circumvent state regulation. Suppose, for example, that the system included properties in State A and in State B.

52/ J. Bonbright, Public Utilities and the National Power Policies 24-25 (1940).

The parent company would then cause the two operating subsidiaries to sell energy to each other at wholesale for resale to the ultimate consumer.

Thus, power generated in State A would move across the state line in interstate commerce to State B. Power generated in B would travel in the opposite direction. And neither A nor B could regulate the rates. The Supreme Court had held that in this situation:

> Plainly . . . the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to . . . regulation by either of the two States in the guise of protection to their respective local interests, but if such regulation is required it can only be attained by the exercise of the power vested in Congress. 53/

This so-called "Attleboro gap" enabled interstate holding company systems to set their own rates. 54/ Sometimes the interstate wholesale transactions were motivated by a desire to achieve that end. Sometimes they were motivated by considerations of efficiency and economy. Sometimes the motives were mixed. Whatever the motive, the result was the same. The ultimate consumer was at the holding company system's mercy.

53/ Public Util. Comm'n. of Rhode Island v. Attleboro Steam and Electric Co., 273 U.S. 83, 90 (1926).

54/ The gap took its name from the case cited in the preceding footnote. See 2 Priest, Principles of Public Utility Regulation 524-556 (1969).

The Public Utility Act of 1935 dealt with this and with other public utility holding company problems by: 55/

(A) Subjecting the holding companies and their finances to regulation by the Securities and Exchange Commission;

(B) Prescribing tests which holding companies had to meet in order to escape compulsory dissolution: these led over the years to the extinction of most of the hundreds of public utility holding companies that were formerly piled on top of each other in complex, incestuous tiers -- and ultimately liberated most of the operating companies from holding company control;

(C) Requiring the holding companies that survived because they were able to show that they served some real business purpose to limit themselves to "a single integrated public-utility system;" 56/ and

(D) Placing rates and charges for "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce" under the Federal Power Commission's regulatory control.

55/ 49 Stat. 838, codified in 15 U.S.C. §79 (1976), et seq. and in 16 U.S.C. §792 (1976), et seq.

56/ The Act permits the retention of "such other businesses as are reasonably incidental and economically necessary or appropriate to the operation of such integrated public-utility system." Section 11(b)(1) of the Public Utility Holding Company Act, 15 U.S.C. §79k(b)(1) (1976).

For many years, the Commission's ratemaking authority was read in light of the history that has just been recounted. The electric rates with which the Commission was concerned were those charged by a wholesaler in one state to a retailer in another. Where the wholesaler and the retailer were in the same state the Commission stayed its hand. So its jurisdiction reached only a limited segment of the total wholesale market.

After a quarter of a century, technological change led to legal change. By the late 1950's, most of the Nation's generating facilities were interconnected with others across state lines. Hence it could no longer be said that all of the power sold by an electric utility with all of its generating plant in one state necessarily came from that state. Some of it was coming from other states. Electrons know no State lines. And they were now flowing in comingled streams, parts of which came from other states.

This meant that when a wholesaler in, say, Pennsylvania sold power to a retailer who was also in Pennsylvania, it was at least possible that some of that power came from New Jersey or Maryland. So the transaction between the Pennsylvania wholesaler and the Pennsylvania retailer involved "the transmission of electric energy in interstate commerce."

Engineering developments, it could be said, had ousted the states from the wholesale field by bringing virtually every wholesale transaction in the land within the Commission's exclusive jurisdiction.

When the argument was presented in a case involving a California utility and municipal purchaser, the FPC held that whenever out-of-state energy moves from a wholesaler to a retailer, the relationship "concerns more states than one and is subject to Federal regulation under the Federal Power Act and not to state regulation." 57/ A unanimous Supreme Court affirmed in what has come to be known as the Colton case. 58/

By extending the Federal Power Act's reach to practically every wholesale transaction in the land, 59/ Colton made for what many view as jurisdictional inflation. For the moment and for the sake of argument, let us accept that characterization. Let us also concede that the Commission's resources were meager, its efficiency less than optimal, and its processes cumbersome. Nevertheless, there was no breakdown. There was no crisis.

57/ City of Colton v. Southern Cal. Edison Co., 26 F.P.C. 223, 230 (1961).

58/ Federal Power Comm'n. v. Southern Cal. Edison Co., 376 U.S. 205 (1964).

59/ The reference is to the continental United States. Texas is something of a special case. The Texas situation is the subject of pending proceedings before the Commission.

That was to come later as one of the many lamentable by-products of the virulent price inflation of recent years.

Of course, price inflation has long been with us. It began in 1940. The post-Colton jurisdictional inflation did not make its appearance until 1963.

Until the 1970's, however, the rate of price inflation was usually gentle compared to the rates that became chronic after 1970. In the electric utility field until the 1960's the dividends of technological progress were sufficient to offset the impact of the gently rising general price level. So the relative price of electric power fell. And even during the 1960's, there were many instances in which its absolute price also fell. 60/ As late as 1970, there were electric utilities that boasted that they had never asked a regulatory body for a rate increase. I know of no company that can make that boast today.

About ten years ago, electric utilities entered the time of troubles from which they seem unlikely to emerge within the near future.

60/ The Colton case itself involved a price increase that had been approved by the California Commission. That, however, was incidental. At the time Colton was decided, the Commission's major concern was not with rate increases, but with the Commission's power to investigate existing rates and to order that they be lowered in the future. See Section 206 of the Federal Power Act, 16 U.S.C. §824e(b) (1976). Indeed, many thought at the time that the new-found jurisdiction would be employed primarily as a device to bring wholesale rates down.

Fuel expenses rose. Construction budgets soared. Environmental controls imposed costs unthought of in an earlier day. Interest rates zoomed. 61/ Market-required rates of return on utility common stocks rose steeply.

The investing public's appetite for new utility securities, which had seemed insatiable in the mid-sixties, turned very skittish. Cautious people, and the industry has traditionally looked to the conservative investor, were unsettled by the omission of a Potomac Electric Power Company common stock dividend in 1969 and by the omission of a Consolidated Edison Company common stock dividend in 1974.

On top of all this, technological progress, which tends to proceed at an uneven pace, reached an apparent plateau. Electric utility managers could no longer look to ever larger generating units as a deus ex machina that would extricate them from the need to raise their rates.

61/ This had a two-pronged effect. The first was obvious. New debt capital became far more expensive. The second was not quite so obvious. It involved the large quantities of debt securities that had been sold to the public from 1935 to 1960 when interest rates were low. Much of this debt was now maturing. It had been incurred at unprecedentedly low rates, and it had to be refinanced at unprecedentedly high rates. Three percent money was being replaced by 10 percent money.

The electric rate field, which had long been a quiet backwater of interest to people in the business, to regulators, to students of utility securities, and to a handful of economists, but unexciting to practically everybody else, now assumed a prominence that it had not had since the 1930's when the Congressional debates on the Public Utility Holding Company Act were on the front pages for weeks.

But there was an important difference between the two eras. During the thirties the ratepayer whose income had been cut in half by the Depression but who was still paying 1928 rates for electricity and gas could blame the holding company pirates, the investment banking fraternity, and ludicrously ineffective regulation. The legions of investors who lost their savings in the collapse of the multi-tiered holding company pyramids were in the same frame of mind. In the 1970's, however, there was no one to blame. Thinking people knew that the age of cheap energy was over, that forces beyond anyone's control were sending rates up, 62/ and that they were confronting a crisis without a villain. 63/

62/ The Electric Power Research Institute reports that during the eight years from 1960 to 1968 increases obtained from regulatory bodies by investor-owned utilities amounted in the aggregate to $117,000,000. For the ensuing eight years from 1968 to 1976 the corresponding figure was $11.4 billion, almost a hundred times as much.

63/ The question was not, should rates rise? It was obvious that they had to rise. It was, by how much should they rise?

Hence the Commission was inundated by a torrent of electric rate increase filings. 64/

The table below tells the story: 65/

NUMBER OF ELECTRIC RATE INCREASE APPLICATIONS FILED WITH THE COMMISSION

FISCAL YEAR	NUMBER OF APPLICATIONS FILED
1965	17
1966	8
1967	4
1968	3
1969	9
1970	11
1971	46
1972	35
1973	56
1974	82
1975	134
1976	191
1977	153
1978	110
1979	153

64/ Also, it is likely that the number of rate increase applications would have been much larger after the oil embargo beginning in 1973 were it not for the fact that nearly all public utilities have fuel cost adjustment clauses in their wholesale rate schedules. This allowed those utilities to pass along to their wholesale customers the large and steady increases in fuel costs that have persisted over the last seven years. Fuel costs are the largest single item of cost for most utilities, ranging up to as much as fifty percent of the cost in some cases.

65/ But not the whole story. As the increase in the time for processing filings became longer because of the backlog, inflated rate filings became more prevalent. With the greater likelihood that the rate case could not be handled expeditiously, applicants had an incentive to ask for more than would be currently justified with the expectation that increasing costs would quickly catch up to the inflated rate request. The interplay between state regulation at the retail level and Federal regulation at the wholesale level is also pertinent. At the state level the investor-owned companies were confronted by what they called "regulatory lag", and "inadequate rate relief".

The Commission was unequipped for this deluge of business. Its electric rate operation was a small-scale affair that consisted of a few people accustomed to the intensive, in-depth examination of a very small number of cases. What we had was a carriage-trade custom tailoring shop that had stressed craftsmanship and meticulous fitting ever since it opened for business in 1935.

When that shop began to get more orders in a year than it formerly had in a decade, it could not cope. 66/

Each stage of the process had its bottlenecks. Cases could not get off the ground because the Commission had no judges available to try them. 67/ When a judge was found at last (sometimes he had to be borrowed from some other agency), the staff which had scores of older cases to worry about was unable to proceed. So it asked for adjournments.

When the record finally wound its way to a conclusion, the judge could not give priority to the preparation of the initial decision. There were nine or more initial decisions that he had to write in older cases.

66/ A serious effort to do so would have required more resources. These were not made available in the critical fiscal years 1975 through 1977.

67/ The Commission's Administrative Law Judges also had their hands full with a large and increasing number of cases under the Natural Gas Act. This was also true for Commissioners and their opinion writers. Indeed the rapid growth in gas related cases imposed even greater stress on the decision process than those arising under the Federal Power Act.

When the initial decision issued and the inevitable appeals followed, the staff had to ask for extensions of time to prepare its briefs because it had no one available to write those briefs.

After all the briefs were in, the case would go to the Commission's Office of Opinions and Review, then called the Office of Special Assistants. There it would lie around for months (and in a few instances for more than a year) because there was no lawyer available to whom it could be assigned. When one was assigned, the lawyer had great difficulty in obtaining needed technical assistance. The technical advisory staff was overwhelmed. 68/ It had no one to spare for the extensive discussions that are often essential if a reasoned analysis of a complex problem is to be made.

When the drafting attorney produced a draft and circulated it to other people on the Commission's advisory staff for comment, it was generally found that the draft had dropped into a void. Everyone had an overflowing in-box. The draft went to the bottom of those boxes.

Since there seemed to be no realistic prospect of ever catching up, all sense of expedition evaporated -- a mañana psychology developed. The cases were already so old. What real harm would there be if they grew a little older?

68/ And discussions with the staff attorney or with the staff witness in the case were generally barred by the Commission's rules.

The situation was aggravated by the paucity of Commission precedent and by the ad hoc "in the special circumstances of this case, we hold such and such, but we lay down no general rule" flavor of the Commission's electric rate case law.

This meant that the litigants, the Commission's litigating staff, its opinion writing staff, and the Commission itself tended to treat each case as though it were one of first impression. Each of the many problems in a case was dissected with painful care. Often alternative drafts were prepared.

When those drafts reached the Commission table, they were often complex and turgid. Sometimes the document was almost incomprehensible to a reader not totally immersed in the massive record. Hence members of the Commission needed more time than ideally they should have needed for reflection and analysis.

I must repeat that these cases are not simple.

How much is justified? Needed? As compared to what? How are the costs of what is from a technological point of view a single integrated operation to be allocated between the retail service and the wholesale service?

These questions, the eternal staples of regulation, are never easy. In an age of sharp and seemingly permanent inflation they become particularly difficult. There were sharp conflicts of opinion on the staff and among the commissioners.

These clashes further complicated the decisional process. Discussions at the Commission table were often long, heated, and inconclusive. Drafts were frequently sent back for more

staff analysis, for rechecking of the record, and for rewriting. 69/

In these circumstances the number of pending cases mounted inexorably.

The table below recounts the growth.

NUMBER OF CASES PENDING AT THE END OF THE FISCAL YEAR UNDER PART II OF THE FEDERAL POWER ACT (NOT ALL OF THESE CASES INVOLVE WHOLESALE ELECTRIC RATES, BUT MOST OF THEM DO.)

YEAR	NUMBER OF CASES
1963	12
1964	17
1965	24
1966	25
1967	23
1968	30
1969	28
1970	28
1971	43
1972	60
1973	97
1974	135
1975	179
1976	230
1977	227
1978	272
1979	248

The reader will have noted that the growth in the backlog was checked in 1977 but that the check was momentary and that the Commission's inventory of undecided cases soared again to a new high in 1978. The reason may be found in a 1976 development in the law that made wholesale electric rate jurisprudence

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69/ Changes in Commission personnel had something to do with this.

even more complex than it had theretofore been. 70/ The development to which I refer is the Supreme Court's decision of June 7, 1976, in Federal Power Commission v. Conway Corp., 426 U.S. 271.

Before Conway the Commission looked at wholesale rates as though they were a self-contained world all their own. It thought that it had no power to consider or even to look at the retail rates. It followed that the Commission had no jurisdiction to adjudicate allegations that the relationship between the two sets of rates was discriminatory and anti-competitive.

In Conway a unanimous Supreme Court found that view "untenable." 71/ The Court held that:

> The Commission...cannot...put aside its duty to consider whether a proposed rate will have anticompetitive effects. The exercise by the Commission of powers otherwise within its jurisdiction 'clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations....' [The quotation was from Gulf States Util. Co. v. F.P.C., 411 U.S. 747, 758-759 (1973).] The Commission must arrive at a rate level deemed by it to be just and reasonable, but in doing so it must consider...allegations that the proposed rates are discriminatory and anticompetitive in effect. 72/

70/ Thus, even though the number of rate increase applications began to fall off in 1977, that reduction did not result in a corresponding reduction in the number of pending cases.

71/ 426 U.S. at 277.

72/ Id. at 278-279 (Emphasis added).

The Commission's sitting members view the promotion of such competition as there is in the electric utility industry and the extirpation of anticompetitive practices in that area of the economy as basic to their mandate under the Federal Power Act. 73/

But the discharge of that mandate is no easy matter. Conway raises many thorny questions. For example, how does one determine whether there is or is not a "price discrimination" between the wholesale and the retail rates? This is a good deal more complicated than it seems.

There is no single, established method for measuring price discrimination, even though the Commission has decided that wholesale rates and costs have to be compared to retail rates and costs to determine whether there is a retail-wholesale price discrimination. 74/ What happens if different measurement

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73/ Section 207(b)(3) of the Public Utility Regulatory Policies Act shows that Congress is of the same view. Also noteworthy in this regard are Sections 102 (12) and 102(17) of the Department of Energy Organization Act. The first of those sections states that that statute is intended "to foster and assure competition among parties engaged in the supply of energy and fuels." The second states that one of the Act's purposes is "to foster insofar as possible the continued good health of the Nation's small business firms, public utility districts, municipal utilities, and private cooperatives involved in energy production, transportation, research, development, demonstration, marketing, and merchandising."

74/ See the Commission's Opinion No. 31 in Missouri Power and Light Company (October 27, 1978) and its Opinion No. 31-A in the same case (May 16, 1979).

techniques give conflicting answers? Should marginal costs be used to test for price discrimination even though average costs are the basis for rate setting?

Suppose that the wholesale customers have been discriminated against but that the disparity in the rates was small and that it did not last long. When is a price differential too small in amount or too short in duration to be not worth worrying about? When can discrimination be considered de minimis?

What is the relevance of the state commission's actions? Many price squeezes stem wholly, or in part, from differences between state and Federal practices or from differences in the timing of rate increases. The state commission's lowering of the retail rate to a level that had a discriminatory and an anticompetitive impact on the wholesale buyer may immunize the utility from liability under the antitrust laws. But the Commission is not an antitrust court. Hence it has held that state commission action (or inaction) does not constitute an absolute defense to a price discrimination claim asserted before it under the Federal Power Act. 75/ However, the "state action" claim can be pertinent to the question of remedy. 76/

75/ See, the Commission's Opinion No. 62, Southern California Edison Company (August 22, 1979).

76/ Missouri, note 74, supra.

These issues and others are akin to those that are raised in antitrust inquiries and that perplex antitrust courts. 77/ Antitrust litigation is proverbially protracted. That is so, in part, because of the intricacy of the economic inquiries for which it calls. Today price squeeze is an issue in almost every litigated wholesale electric rate increase case. This necessitates inquiries that are both exhaustive and exhausting. 78/

The price squeeze inquiries before the Commission are important. They delve into areas that were long neglected and that warrant exploration if competition is to be kept alive and fostered. But they do not accelerate the pace of adjudication. They slow it down.

77/ The allegations made before the Commission by a customer that regards itself as a "squeezee" are sometimes also being made before an antitrust court where the "squeezee" has brought a treble damage action against the wholesaler under the Sherman and/or Clayton Acts.

78/ Although these inquiries are by no means identical to those that an antitrust court would have to make were the question tendered to it, the two investigations have much in common.

CHAPTER VI

VI. WHAT HAS THE COMMISSION DONE TO REMEDY MATTERS?

My predecessors in the Chairmanship, our fellow Commissioners, and the Commission's staff have struggled earnestly and conscientiously with crushing workloads undreamt of in the Commission's early years, with grossly inadequate resources, and with policy questions of incredible complexity. Nevertheless, by 1977, it was obvious that:

(1) The old ways were not working.

(2) New approaches were needed.

(3) The case for innovation was especially strong in the electric rate area where the Commission's long-standing tendency to give priority to gas matters had helped to produce unacceptable delays that inflicted serious hardship on those whom the agency was supposed to be protecting 79/ and that had also brought the Commission itself into disrepute. Accordingly, the following steps were taken:

(A) STAFF INCREASES 80/

There has been a sharp increase in the number of

79/ In some cases, the delays also inflicted hardship on the regulated utility whose earnings were clouded by long continuing and uncertain refund potential.

80/ Of course, staffing increases were not made unilaterally but only with the approval and active support of the Commission's appropriations and legislative authorizing committees of the Congress.

lawyers assigned to the Office of Opinions and Review. 81/ The Commission's electric rate staff has also been augmented in both its Office of Electric Power Regulation and Office of General Counsel. 82/

The full benefit of those resource additions cannot yet be measured. Public utility regulation is an arcane field. Lawyers, engineers, financial analysts, and accountants well versed in the pertinent mysteries are hard to find. The supply of experienced utility specialists is limited. Recruitment is difficult. Hence, many of the new members of the Commission's staff are not experienced in the matters with which the Commission deals. 83/

A number of the people who have been appointed to the Office of General Counsel, to administrative law judgeships and to the Office of Opinions and Review have had valuable

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81/ In fact, the authorized positions have more than doubled -- from 17 positions in FY 1977 to 35 in FY 1980. The interval between the date on which the last brief was filed and the date on which the Office of Opinions and Review begins serious work on the matter is now much shorter than it used to be. Moreover today when a case is ready to go to trial, a judge is almost always available to hear it without delay. Initial decisions are also being issued much more speedily than they were in the past. That is possible because the judges' workloads are now manageable. At least in part this is also the result of an increase in the Commission's corps of Administrative Law Judges.

82/ The technical staff in the Office of Electric Power Regulation and the electric rate staff in the Office of General Counsel have been increased from a FY 1977 authorized level of 79 positions to a FY 1980 level of 107.

83/ However, there are some notable exceptions.

experience with other types of economic regulation. But that experience cannot be transferred instantaneously. Some time must be allowed for orientation and on-the-job training before new professional employees can be expected to perform at their full potential.

(B) BETTER BOOKKEEPING -- By 1977 the Commission had gotten itself into a mess that was so bad that cases would "fall between the cracks" and vanish into limbo with distressing frequency. Lines of authority were so fuzzy and recordkeeping was so poor that it was almost impossible to fix responsibility for delays or to identify the most serious trouble spots. That chaotic state of affairs has been significantly alleviated through the imposition of better management controls. The first stages of a comprehensive tracking system has been installed. When this system is fully implemented -- and these things take time to put in place -- we will be able to report to supervisors on a current basis precisely where in the decision process cases are, what is holding them up, and who is responsible for what.

(C) AN INTENSIVE ATTACK ON THE ELECTRIC RATE BACKLOG -- Under the aegis of my colleague, Commissioner Matthew Holden, Jr., 20 venerable electric rate cases were singled out for special treatment. These were attacked on a "top priority, drop everything else" basis. The results were excellent. But no such intensive drive can be sustained on a continuing basis without damage to the Commission's other work.

Hence we have had to turn to other approaches. The one that seems most promising centers on "priority cases" that appear especially significant. These are identified by the Director of the Commission's Office of Electric Power Regulation. The Commission's decisional staff then concentrates on those cases. Every effort is made to bring these matters before the Commission as speedily as possible.

(D) ENCOURAGING SETTLEMENTS - In rate cases, as in other kinds of litigation, a pragmatic give-and-take compromise that resolves the controversy in 1979 is almost always better than an erudite opinion that does not issue until several years later and that reaches an end result essentially the same as the one that would have been reached by negotiation years earlier, had there been a will to settle on both sides.

Moreover, the Commission has to administer mass-production justice. Its jurisdiction is so broad and its caseload so large that the system cannot possibly work at an expeditious pace unless most cases are settled -- and settled early. Hence, unless major public policy issues are involved, the Commission must do all that it possibly can to encourage settlements and to act on them with dispatch.

The courts have long been doing that. And it is essential that we follow their example. This will lighten our docket. More important (infinitely more important) it will save litigants', ratepayers' and taxpayer's monies.

Until recently the Commission was seriously and inexcusably derelict in this regard. Uncontested offers of settlement in which everyone with a stake in the matter was amenable sat around for a year or more. That is no longer so.

New procedures have been adopted under which settlement proposals go on a fast track and are acted on with dispatch. 84/

Of course, the Commission cannot rubber-stamp settlements. It must review them for consistency with the public interest. When so-called "contested settlements" are concerned, that review must be painstaking. 85/ But the review should also be expeditious. Under our new procedures it is.

(E) DELEGATION BY THE COMMISSION TO THE STAFF -- Many routine, non-decisional functions that once crowded the Commission's agendas and that absorbed vast amounts of its time are now handled at the staff level. Freed from much of the trivia and the routine that formerly drained its time and energy, the Commission is now better able to keep abreast of its decisional work. 86/

84/ The Commission established in May 1979 new administrative controls applicable to the processing of settlement agreements. Also we have revised the Commission's rules of practice and procedure to make the settlement procedure more orderly. The fruits of these efforts have been extremely encouraging.

85/ In these matters the Commission functions in much the same way as the courts do when they pass on proposals for the settlement of shareholders' derivative actions, class actions, actions affecting minors, and other types of cases in which the public interest is deemed to demand close and disinterested scrutiny of proposals for compromise.

86/ In two steps, the Commission delegations of authority have removed from the Commission to the staff, some 6,700 items annually. Every staff decision made pursuant to a delegation is appealable as a matter of right to the Commission. Few such appeals have been lodged.

(F) REALISTIC INTEREST RATES ON REFUNDS -- For many years the Commission has set the interest rate on overpayments by customers at an arbitrary figure that was sometimes above, but often below, the market rate of interest. Since October of 1974 the rate prescribed by the Commission has been 9%. Because of inflation, that rate did not always reimburse the wronged customer for the time value of its money. In most circumstances, it enabled utilities to borrow from their customers at attractive rates.

This has now been reformed. On October 1, 1979, the interest rate on refunds was tied to the prime rate values published in the Federal Reserve Bulletin. Moreover, the interest will no longer be simple interest. It will be compounded quarterly.

This reform makes lengthy litigation as costly to the utility, incurring the mounting refund obligation, as it is to the customer deprived of the use value of money. A compounding prime rate of interest (especially in recent times) can do much to encourage expedition. Hence the revision of the interest rate on refunds may promote settlements. And it will most assuredly do something to mitigate the hardships that the Act's suspension provisions impose on customers.

It will also make for some modest gain in administrative efficiency. Laborious rulemaking proceedings aimed

at bringing the Commission's interest rate into line with the rapidly moving target of economic reality in the money markets will no longer be needed. The change will occur automatically. I should emphasize that there is nothing punitive about this important step. Should interest rates fall, the companies will be better off than they would have been under the old 9% rule.

Other changes might be mentioned. But they are of little general interest. 87/ And it would be foolhardy to claim much for any of the changes thus far made. They have not been in place long enough to warrant such claims.

One sees some improvement. But its extent is difficult to measure. It is also hard to say how much of such improvement as there has been is attributable to the reforms thus far instituted.

A sharp decline in the number of electric rate increase filings may have done more to improve the statistical picture than any of the measures taken up to now.

During the past several years, many utilities have curtailed or abandoned expensive construction programs. Some companies have also raised cash by selling interests in generating and transmission facilities to their wholesale customers. These steps have eased the financial pressure on the wholesalers.

87/ This does not mean that I regard those measures as trivial. It means only that time is needed to give them a fair chance to show what they can do.

Hence rate increase filings are less numerous than they were. The reader may recall that the number of electric rate increase filings soared to an all-time high of 191 in fiscal 1976. That number fell to 153 in 1977. It fell still further to 110 in 1978. And the number of filings made in 1979 was 153.

A decline of these dimensions has obviously had a favorable impact. The Commission is not quite so totally submerged as it was when it set out on October 1, 1977. But things are still very bad. 88/ A new upsurge in filings -- and there is likely to be such an upsurge sooner or later -- will, of course, make them worse.

88/ There were still 248 pending cases at the beginning of FY 1980.

CHAPTER VII

VII. WHAT MORE CAN THE COMMISSION DO?

In the coming months, the Commission will re-examine every aspect of its operations with a view to making its processes faster, more efficient, and fairer.

Much spadework has already been done by the Commission's Advisory Committee on Revision of Rules of Practice and Procedure and the Commission's own staff. Indeed the Commission's Assistant General Counsel for Electric Rates has assembled a veritable pharmacopoeia of 34 remedies, some administrative and some statutory.

The vast literature on judicial delay has also been consulted. A perusal of the fair-sized libraries that have been collected around this topic is depressing because it suggests that the disease is intractable, that loudly trumpeted miracle cures have failed to live up to their discoverers' claims, and that the more things change the more they remain the same. Nevertheless, that examination has its virtues. It reminds one of the need for caution and for skepticism. It deters large claims and acts as a check on one's faith in the efficacy of his or her own pet nostrums. And it also unearths some ideas worth trying.

The avenues that seem more promising to me are these:

(A) AN AFFIRMATIVE PROGRAM TO ENCOURAGE SETTLEMENTS -- A few pages ago, I referred to the procedures that have recently been adopted for the purpose of assuring fast action on settlements. 89/ They are a good beginning. But they are only a beginning.

Full-blown rate litigation is inherently time-consuming and expensive. And the totality of the litigation costs are borne by either the taxpayer or the ratepayer. Much of this litigation is socially wasteful. Great questions of principle are seldom involved. When such questions are presented, the agency is unable to deal with them expeditiously because it is drowning in an ocean of more or less routine cases that should have been settled but were not.

To borrow from the terminology of labor relations, the Commission must be both mediator and arbitrator. 90/.

At various times in the past, drives aimed at promoting settlements produced good results. There was a modest but successful 1977 effort in the electric rate area. And there were earlier ones in the natural gas field. All agree that

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89/ See Chapter VI, supra.

90/ My reference is to the Commission as an institution. Save in the rarest of instances, I think it inadvisable for the Commissioners themselves to become involved in the settlement process.

these efforts were productive. The trouble with them was that they were one-shot short-term affairs. It seems clear to me that a permanent mediation program is needed and that it can do a great deal to alleviate the delay problem. 91/ I believe we need someone to preside over settlement agreement conferences and that person should be of sufficient standing, knowledge and temperament to dissipate the clouds of mutual distrust that envelop these cases and to do an effective job of conciliation. What is needed most of all is a device for tempering the adversarial nature of the cases, a means of exerting gentle leadership in the settlement process.

Some may equate this with a quasi-master system--and perhaps that is a fair analogy. What I have in mind is a procedure which has been employed with success in a few cases. Simply put, in particularly difficult cases it would allow a presiding judge (or the Commission itself if the matter were before the Commission after the judge had rendered a decision) to request the appointment of a settlement judge to preside over a conference of the parties, to assess the practicalities

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91/ Even now, about half of all wholesale electric rate cases are ultimately settled. Were that not so, matters would be much worse than they are.

and the potential for settlement, and to report back on the matter. 92/ A number of positive gains are anticipated. Among these are:

(1) A structured, supervised discussion may overcome obstacles to settlement which may have more to do with the hostility that has developed between counsel than it does with substance.

(2) The presiding judge, who is ultimately responsible for managing the case, can get a true and objective report on whether settlement is, in fact, likely. Strategic delays under color of attempts at settlement can be unmasked.

(3) In those cases where settlement is a practical possibility, the judge who is monitoring the settlement talks can exert some control over the schedule and over the agenda for discussion so as to keep alive or advance the "opportunity" for settlement.

92/ There are a number of important details, but these should not encumber the text. The appointment is to be made by the Chief Administrative Law Judge. The request can also be made by any party or by the Commission's staff. In that case, however, if the matter is still at the hearing stage, the presiding judge must concur. The presiding judge is to have full discretion in this matter. The decision whether to refuse a motion for the appointment of a settlement judge will not be reviewed by the Commission.

Of course, concurrence is not required if the motion is made with respect to a matter before the Commission. Also, in such a case, the Chief Administrative Law Judge may decide to appoint the judge who handled the underlying case.

(B) A SHARP SHIFT IN EMPHASIS FROM ATTEMPTS AT FINE TUNING ON A CASE-BY-CASE BASIS TO CLEAR GENERAL RULES --To what extent should those who decide be constrained by rules of law? And to what extent should they be free to use their discretion to do justice in the particular case? Legal philosophers have debated these questions for centuries. They are probably as old as law itself.

The Commission's tradition has been one of ad-hoc case-by-case adjudication. The effort to develop general rules has been rudimentary. The Commission's decisions have not been grounded on a set of well-developed "regulatory principles." They have been result-oriented. One who comes to its reports without a prior orientation in the field finds what looks like an unrelated collection of single instances.

When electric rate cases were few and far between, that approach was both justifiable and workable. Then the Commission had good reason to proceed on the premise that its primary task was to reach the best possible result in the particular case. In the electric rate world of today that premise is no longer tenable. The traditional "let us not bother with doctrinal baggage, let us not worry ourselves about precedent or consistency, let us do justice in this particular case" tack has spawned protracted litigation. Wholesalers, wholesale customers, counsel, the Commission's staff, and its administrative law judges find too little guidance in the Commission's reports and so are left to fashion results all too often as if they were matters of first impression.

Perfect justice in the individual case is an attractive ideal. But its pursuit becomes self-defeating when one attempts to apply it on a volume basis. So we need more emphasis on clarity, predictability, and general rules and less on the nuances of particular cases. Without such a shift in emphasis, no real headway can be made. The shift will have to be effected by:

(1) The adoption of generic rules addressed to commonly litigated issues;

(2) The promulgation of statements of policy to give guidance to the parties and staff;

(3) The use of the "leading case" approach in opinions, with a serious effort to lay down intelligible standards of general applicability; and

(4) Greater fidelity to precedent in the Commission's adjudicatory work--once an adequate body of clear and viable precedents has been established.

(C) DRAINING THE RATE OF RETURN SWAMP -- This is actually a specialized aspect of the rule-versus-discretion dichotomy that I have just discussed. But its importance is so great as to warrant separate treatment.

What is a fair rate of return on the capital invested in this enterprise? That is a hotly disputed question in almost every rate case. More often than not, it is the key question. It is the "money issue."

Senior securities (debt issues and preferred stock) seldom present such a problem. There the rate of return is fixed by contract. The investor and the issuer have already struck their bargain. The interest rate or the preferred stock dividend rate for which that bargain calls is the issuer's cost. Assume, for example, that X Company sold 3% bonds in 1945, when high-grade debt securities were easily salable at that rate, and that those bonds are still outstanding. Though X Company would have to pay 10% or more if it were borrowing today, it is still paying only 3% for the use of that money. Hence there is no justification for assigning a higher cost to this component of its capital structure. The holders of the 3% bonds would not benefit. They would still be limited to the coupon rate. Were the company to be allowed a return of more than 3% on the principal sum of its outstanding 1945 obligations, the excess would be a windfall for its common stockholders.

The difficulties arise when one moves from fixed-income securities to common stock. The investor in common stock is buying a right to an indeterminate stream of anticipated future income. And it is impossible to be precise about anticipations. Hence there is no known or generally agreed upon method for fixing the cost of common equity with exactitude.

Regulatory bodies cope with this problem by comparing the particular company under examination with others that

seem analogous to it, by looking at the data that the stock market generates about "return on investments in other enterprises having corresponding risks," 93/ and by looking at the dividend yield to the investor at the current market price plus the rate at which dividends can reasonably be expected to grow. 94/

93/ Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944).

94/ Rate of return theory is a battleground. Traditionalists emphasize rates of return on book value. If concerned with the Hypothetical Electric Company, they look at what a group of companies that they consider comparable to Hypothetical is earning on common equity. If the average is 12.5%, that becomes the benchmark. Hypothetical may be entitled to 12.75% because it is a little riskier than most of the other companies. Or it may be entitled only to 12.25% because it is believed to be rather more attractive to investors than the typical company in the sample. In either event the primary emphasis is on what other companies are earning on the book value of their common equity.

In recent years questions have been raised about the validity of the comparable earnings approach. Its critics consider the emphasis on book values and rates of return thereon unrealistic. They point out that investors do not buy stocks at book value. They buy them at market prices. Those who adhere to the market-oriented school focus on the dividend yield to the investor at the market price plus the growth expectations that lead people to buy common stocks rather than fixed-income securities. They would look at Hypothetical's market price, at the ratio of its current dividend to that price, at Hypothetical's dividend history, and at the rate at which Hypothetical's dividend can be expected to grow.

The Commission's staff has been divided by this conflict. Sharp differences between the adherents of these rival schools are aired at the Commission's table. A great deal of time has been expended in the preparation of alternative draft opinions and memoranda which challenges the assumptions, even the good faith of the "other side".

Since the electric utility industry is so capital-intensive and since the regulatory body's conclusion as to the proper rate of return on common equity presumptively has a significant impact on the ultimate rate and on the financial condition of the company involved in the particular case, 95/ the normal practice is to make an in-depth examination of the particular company's history, present state, and future prospects.

This involves a battle of the experts. These are not simple matters. And there is often a great deal of room for legitimate differences of opinion about just where a particular utility stands and about exactly what it needs in order to give its shareholders fair treatment without subjecting its customers to exploitation.

Expert testimony in rate of return litigation has much in common with expert appraisal testimony on what something is really worth. The experts are fallible. They clash. They are not dealing with matters susceptible to precise measurement. But what other way is there?

95/ The impact depends on the portion of the utility's revenues which are to be affected by the decision.

I would suggest that there must be a better way to exercise this Commission's wholesale electric rate responsibility. For most of the regulated companies the Commission's rate of return decisions are of little consequence. Their wholesale business constitutes so small a part of their total business that the Commission's decisions, whichever way they go, cannot possibly have any significant impact on the company's financial health, on the attractiveness of its securities to investors, or on its ability to raise capital.

Yet the Commission is inundated with reams of case-specific material about the anatomy and the physiology of each of the 215 electric companies that it regulates. Tens of thousands of hours are spent in developing exhaustive records about the financial condition of such entities as the Commonwealth Edison Company, a very large company that services the Chicago metropolitan area but whose wholesale business accounts for about eight-tenths of one percent of its aggregate electric revenues, and the Philadelphia Electric Company, another large metropolitan electric utility that has, however, only a single wholesale customer, which, in turn, happens to be very small. 96/ Other examples could be cited. But these two are enough to make my point.

96/ In the most recently completed Commonwealth Edison proceeding, in addition to the utility itself, six cities were represented. The docket was commenced August 30, 1974. The first prehearing conference was held July 1, 1975 and hearings on the cost of service began on

(Footnote continued on next page.)

Once those records are made, many additional hours are spent in pondering them. The social cost of these inquiries is grotesquely disproportionate to any social benefit that the Commission's warmest admirer could possibly claim for them.

96/ (Footnote continued from previous page.)

March 2, 1976 and, with interruptions for scheduling conflicts, were concluded on June 2, 1976. Total days spent in initial hearings numbered 10. Very shortly after the close of the initial hearing, the Supreme Court rendered its decision in Conway v. F.P.C., and intervenors in Commonwealth filed to expand the proceeding to include a consideration of price squeeze allegations. The price squeeze phase went to hearing on January 31, 1978 concluding after five days. At least eight staff personnel were directly involved in the litigation phase of this proceeding. Numerous additional Commission personnel were involved in the post-initial decision phases of the proceeding. A minimum of 19 individuals appeared for the parties in the proceeding either as attorneys or expert witnesses. The record ran to 2,251 pages in 21 volumes. Briefs alone ran to 702 pages. The company's litigation cost attributable to this proceeding, as reported by the company, was just over $200,000. The amount of the increase requested was $3,969,000 which, if granted, would have brought Commonwealth's annual revenues from the seven wholesale customers to a total of $13,175,000, approximately eight-tenths of one percent of Commonwealth Edison's total 1974 electric revenues. The amount of the increase alone was approximately .24 percent of Commonwealth's total electric revenues. While constituting an exceedingly small portion of Commonwealth's revenues, it must be kept in mind that the proposed increase, if granted in full, would have raised the cost to the wholesale customers by just over 43 percent from what they had been paying prior to the proposed rate taking effect.

Turning to the above example cited in the text, that of the Philadelphia Electric Company, we find that wholesale sales account for only about one-third of one-percent of the company's gross receipts from the sale of electric power, that its last wholesale rate case before the Commission took 19 months, and that its pending case in which an initial decision is now awaited has already been in progress for that same 19-month period.

The Stelzer Subcommittee has looked at this and thinks the Commission should pursue an alternative approach. It suggests that the Commission look at the electric utility industry as a whole, that this examination be made through rulemaking procedures, and that "the Commission...then decide upon a range of return on equity -- a range of about one percentage point -- applicable to all electric utilities." 97/ The Subcommittee adds:

> This overall finding should be possible because capital markets are national in scope, and the costs of capital to individual utilities tend (except in exceptional circumstances) to move together.... Individual companies would then be free to decide whether delays incident to efforts to obtain the higher end of the found range would be worthwhile in their individual cases. 98/

It might be well for the Commission to go further than that. The range concept could be reserved for companies whose wholesale revenues account for more than a given percentage, say, 10% of their aggregate gross revenue. Where wholesale revenues are less than that, perhaps the industrywide

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97/ One member dissented from this recommendation.

98/ The Subcommittee comments that "[w]ith such Commission guidance, the settlement process could be simplified and the hearing process, now characterized by exhaustive (if not exhausting) and frequently duplicative evidence, considerably shortened. A well-reasoned and comprehensive rule on this issue is therefore an important element in the general process of making prompt and timely decisions. Often other decisions flow from a proper decision on this point -- the money issue."

norm should be controlling. Or perhaps the benchmark rate of return should be fixed by a general formula tied to some neutral market index; the formula would be developed in a rulemaking to be reexamined periodically to test its continued validity. This would not be perfect justice. Wholesale customers would lose their present opportunity to show that their particular supplier is in such splendid financial shape that its rate of return should be lower than that general in the industry.

My answer to that is this:

(1) Efforts to achieve a finer degree of equity have landed us in the quagmire in which we now find ourselves.

(2) It would be naive to claim that the status quo and the delays inherent in it result in perfect justice. Rate of return analysis is not a science. 99/

(3) The benefits that wholesale customers sometimes reap from full-dress, case-by-case rate of return

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99/ One member of the Commission's staff has said that, considered as a science, rate of return analysis is about on a par with astrology. That is probably too harsh a verdict. But it is certainly more akin to sociology or psychoanalysis than it is to chemistry or physics.

analysis have to be balanced against the heavy litigation costs that such analysis imposes on them and the taxpayer. 100/

Therefore, it is my intention to present to the Commission a proposal to embark on a search for a generic approach to the rate of return question. 101/ At the very least this endeavor should pursue the recommendations of Dr. Stelzer's subcommittee. And at the very least this proceeding will expose the Commission itself to the experts in this field, to the emerging theories and approaches considered by others. It should, as a consequence then, improve our grasp of the matter and make for better case decisions in the interim should the rulemaking approach ultimately be abandoned.

(D) EXPANDED FILING REQUIREMENTS -- It is obvious that a company that seeks a rate increase knows a great deal more about itself than either the Commission's staff or the company's wholesale customers can possibly know.

100/ And of what of the many instances in which a refined analysis of the particular case results in a decision that requires the customers to pay more than they would have had to pay if an industry-wide across-the-board standard had been used?

101/ In its last days, the Federal Power Commission began such a search. However, that inquiry was much broader than the one I now envisage. It bogged down in controversies about methodology. And the record in that proceeding (Docket No. RM77-1) is now hopelessly stale.

To rectify this information imbalance, the Commission's staff and the customers have to engage in extensive requests for additional information. These efforts, which are made in almost every case, chew up enormous amounts of time.

Hence procedures that would make this information available at the outset of the case are much to be desired. They would save time. And they would also promote settlements. People cannot be expected to be eager to settle before they know what the case is all about.

One hesitates to recommend more paperwork, especially when the burden of paying for it falls on the consumer. But that is not what is involved here. The work has to be done -- sooner or later. The sooner it is done, the greater the benefit to everyone involved in the regulatory process.

The Commission, in August of last year, set down for informal public technical conferences a staff proposal for rulemaking that would comprehensively amend the Commission's present regulations to make initial filing requirements for rate increases more comprehensive and standardized. In January 1980, the Commission agreed in principle to a modified form of the staff's proposal. 102/

102/ Two other facets of the proposed rule are likely to help us better manage our case load. The first concerns the threshold requirement. At present, a utility making application for an increase in annual revenues of $50,000 or less is permitted to file very abbreviated cost support data. A request for an increase exceeding the $50,000 threshold triggers a requirement for a much

(Footnote continued on next page.)

(E) SELF RESTRAINT ON THE PART OF THE COMMISSION

The Commission can affirm its administrative law judges summarily. But it rarely does so. For reasons stated earlier, I believe it should do so more often. The Commission's present opinion-writing practices are wasteful and inordinately time-consuming.

I therefore intend to propose to the Commission new procedures that will, I believe, make for speedier decisions in wholesale electric rate cases. First, I will recommend changing the regulations to permit the parties to seek rehearing of judges' initial decisions in order to improve the

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102/ (Footnote continued from previous page).

more extensive data call. The $50,000 threshold was established by the Commission in 1963. Subsequent inflation has made that an unrealistic threshold. Accordingly, the proposed rule would increase that threshold from $50,000 to $200,000.

The second relates to a proposal to alter the so-called seven-months rule. Under current Commission regulations, an applicant for an increase in rates must file historic data (Period I) and data for a projected test year (Period II). Presently, the last month's data submitted in Period I may be no older than seven months prior to the date of filing. The proposed rule would remove that requirement and substitute a more flexible approach which, it is hoped, will eliminate the incentive to concentrate rate increase filings at the end of the seventh month which follows the close of the calendar year. The "bunching" of filings places a difficult-to-manage peak demand on limited resources of the Commission staff and most participants in our proceedings.

accuracy, clarity and general quality of those decisions. 103/ This proposal is intended to make the second, more significant step more feasible. The second proposal is that the Commission affirm initial decisions summarily much more often than it now does.

A proposal to shorten electric rate cases by adding yet another procedural step to the multiplicity of steps that we already have sounds bizarre on its face.

But that new step will make substantial net savings in time if it improves the quality of the initial decisions and thus enables the Commission to dispense with an opinion of its own in a statistically significant number of cases. Rehearing should do that. It will allow the administrative law judges to correct their errors. Today they have no chance to do that.

Rehearing will also enable the judges to clarify areas in which they have been obscure. Non-essential findings that are not well-founded in the evidence can be eliminated. The end result should be an initial decision that needs no Commission

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103/ In pending cases, as opposed to those that will be initiated under the proposed changes in procedures discussed herein, rehearing of initial decisions will be allowed only to the extent permitted by the Chief Administrative Law Judge.

gloss in order to withstand appellate review. 104/

Finally, the new procedure will permit the law judge to change his or her mind if compelling arguments to do so are raised on rehearing. So initial decisions will be more accurate and better reasoned. Hence the Commission will be able to rely in the main on its administrative bench for routine electric rate decisions. The Commission will then be able to devote its own energies to ratemaking policy questions of general significance. Most students of the administrative process will, I think, agree that this would be a real step forward. That step should, if successful, enable the Commission to act as a leader and innovator in utility regulation. That is the part many believe we should be playing. For at least the last ten years, however, that role has not been fulfilled because of the Commission's preoccupation with full dress adjudication in routine cases that seldom deserved such treatment.

104/ To meet the requirements of the Administrative Procedure Act, 5 U.S.C. § 557(b) (1976), an initial decision must:

> "furnish the parties and the reviewing court with a sufficiently clear basis for understanding the premises used by the tribunal in preparing its conclusions of law, adjudications, and others".

Moreover, the decision must be supported by "substantial evidence". 5 U.S.C. §706(e) (1976) and 16 U.S.C. §8251(b).

The Commission will, of course, continue to fulfill its statutory responsibilities and review each initial decision. It will also concisely state its reasons for disagreeing with any portion of an initial decision which it otherwise adopts. But the Commission has no statutory obligation to issue a separate opinion where the initial decision is supported by substantial evidence and the Commission by order adopts the decision as its own. 105/ Other regulatory agencies, notably the I.C.C., have made extensive use of summary adoption of initial decisions. The practice has been upheld by the courts. 106/ It saves a good deal of time without damaging the quality of justice. 107/

In order to aid the Commission in determining whether to adopt a case by decision and order, I shall recommend that briefs on exceptions be required to follow a standard

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105/ See generally, Auerbach, Scope of Authority of Federal Administrative Agencies to Delegate Decision-Making to Hearing Examiners, 48 Minn. L. Rev. 823 (1964); Marzloff, Delay in Review of Initial Decisions: The Case For Giving More Finality to The Administrative Law Judge, 35 Wash. and Lee L. Rev. 393 (1978).

106/ See, for example, Trailways of New England v. United States, 235 F. Supp. 509 (D.D.C. 1964); TSC Motor Freight, Inc. v. United States, 186 F. Supp. 777 (S.D. Tex. 1960), aff'd, 366 U.S. 419 (1961); American President Lines v. NLRB, 340 F.2d 490, 492 (9th Cir. 1965).

107/ Note also the frequency with which such distinguished courts as the New York Court of Appeals and the United States Court of Appeals affirm either without any opinion at all or by way of a terse memorandum.

format as is the case in the United States Court of Appeals and the Supreme Court. The briefs will be required to list the errors of fact or law asserted, to summarize the brief writer's arguments and to present a concise discussion of the policy considerations that warrant Commission review. 108/ No arguments will be permitted to be made to the Commission on exceptions that were not made to the law judge, except insofar as the revised initial decision contains findings or conclusions different from those in the draft decision. 109/

(F) COMMISSION DECISIONS ISSUED WITHIN ONE YEAR OF ORDER SETTING HEARING

I shall also recommend a sharp tightening of the existing procedural hearing schedules in electric rate cases to enable the Commission to issue a summary decision and order adopting the initial decisions in routine electric rate cases within one year from the order setting the matter for hearing.

The proposed schedule is set forth below:

108/ I would also endorse the idea that briefs to the Commission be covered with summary sheets of no more than five pages. This will require the parties and staff to get right to the heart of the matter. It will also expedite Commission review.

109/ The administrative law judge may recommend Commission review whenever the judge deems that a case or an issue is of sufficient general importance to warrant that.

Order Setting Hearing to	Time Between Steps (in weeks)	Cumulative Time
- "Top Sheets" (preliminary staff position) *	5	5
- Technical conference**	1	6
- Settlement conference	2	8
- Staff testimony ***	4	12
- Intervenor testimony	3	15
- Company rebuttal	3	18
- Beginning of hearing	1	19
- End of hearing	2	21
- Initial brief to ALJ	4	25
- Reply brief to ALJ ****	3	28
- Tentative initial decision	6	34
- Rehearing of initial decision****	3	37
- Revised initial decision or denial of rehearing	3	40
- Briefs on exceptions to Commission****	4	44
- Commission decision and order	8	52

* Equipped with the proposed expanded filing requirements (see next page), the staff may be able to prepare its top sheet at an even earlier date. This shall be attempted where feasible, since the issuance of the top sheet generally marks the beginning of settlement negotiations.

** A meeting at which the data submitted in a rate increase filing are clarified and expanded upon, if necessary, through exchange of information among the technical experts of the parties and staff, and settlement positions are discussed.

*** This schedule provides three months for the pre-hearing stage of a case, including discovery and settlement negotiations. The time allotted for staff testimony includes time to file a motion with the judge to suspend the schedule if a settlement has been reached in principle.

**** Includes mailing time for briefs or decisions.

This time frame assumes four other Commission procedures: a final rulemaking to expand the filing requirements and eliminate most discovery requests; the phasing of the price squeeze issue 110/; rehearing of initial decisions; and the adoption of appellate restraint in routine electric rate cases.

The schedule set out above reflects the result of a number of discussions and consideration of alternatives 111/ with the Chief Administrative Law Judge. Those with years of hearing experience, the law judges, are of the view that the overall schedule outlined above can be met. I therefore believe that the Commission should commit itself to enforcing the proposed schedule unless and until it is demonstrated to be impractical.

The law judges, of course, have no control over the time involved in the writing and issuance of the Commission's decision, which has often been the most time-consuming part of a rate proceeding. If the Commission is to require all parties, including the law judges, to keep to the stringent

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110/ In the case of price squeeze, as outlined in the pending rulemaking proposal, the Commission's decision will be approval of a just and reasonable rate "but for price squeeze," so additional time will be required to finally decide the price squeeze question. However, interim refunds would be made at this point.

111/ The Stelzer Subcommittee Report, for instance, recommended a ten-month schedule from issuance of a Commission order setting hearing to filing of briefs on exceptions. The report of the Assistant General Counsel for Electric Rates recommended an eighteen-month average schedule to final Commission opinion.

proposed schedule, it must be willing to impose self-discipline on its own processes. To provide greater assurance that it will do so, I would make two proposals:

(1) That the Commission commit itself to the issuance of a summary decision or notice of affirmance, in any case in which it proposes to summarily affirm the initial decision, no later than the end of the eight-week period following exceptions;

(2) In those cases where circumstances render summary affirmance inappropriate, the Commission will issue a notice of intent to act. If such action cannot be completed within the scheduled fifty-two weeks, the Commission will attempt to set a targeted date for presentation to the Commission and issuance of a final opinion.

Also, it should be made clear that most of this proposed schedule would be offered simply as a guide to the administrative law judges. As long as the revised initial decision is issued on schedule, the judge may exercise discretion in allotting the time for each intermediate step depending on the circumstances of an individual case. However, the administrative law judge will be directed to take final action 112/

112/ This would take the form of a revised initial decision or denial of rehearing on the tentative decision.

by no later than the fortieth week. No deviation from that deadline will be permitted except by order of the Chief Administrative Law Judge for good cause shown.

Of course the judge's ability to suspend the procedural schedule when a settlement has been reached in principle must be preserved. Time is often required after a tentative agreement in principle has been reached for the negotiators to confer with their clients, to reduce the settlement to writing and to file it with the Commission. It would be a substantial waste of limited Commission technical and legal staff's time to require the preparation of expert testimony in cases where a settlement is a virtual certainty but additional time is required to produce an agreement in filable form. Thus, it is essential that the presiding judge have the discretion to suspend the procedural schedule if convinced by the parties that a settlement is imminent. Since about fifty percent of the electric rate cases which the Commission sets for hearing are settled, it is clearly necessary that the expedited hearing schedule not interfere with the settlement process or the entire case load would become unmanageable. 113/

113/ A number of persons have commented that the settlement process is used at times as a means to indefinitely postpone the litigation of a rate case. To avoid this result, the administrative law judge should be satisfied that there is a reasonable probability that a settlement agreement will soon be reached and that the parties are diligently pursuing this end. As a further safeguard, if the suspension of the procedural schedule imperils compliance with the deadline for decision, the concurrence of the Chief Administrative Law Judge should be obtained.

(G) ALTERED OPINION WRITING TECHNIQUES--The Commission's opinion writing tradition is one of length. There are reasons for that. A rate is a composite of many factors. If each and every one of these factors is litigated, each and every one must be discussed. Other tribunals can go for the jugular. They can dismiss quibbles about non-essentials with a bland: "Other questions are raised. We need not and do not reach them" or with some such formulation as "We find it unnecessary to discuss each of the many points present."

The Commission cannot do that. Something may amount to two thousand dollars in a ten million dollar case. But the utility wants to know whether it can collect that two thousand dollars. And its customers want to know whether they have to pay it. 114/ And the decision may establish a precedent that would be later reflected in larger dollar terms.

Hence the Commission's opinions and orders often seem unfocused and wordy. Inordinate amounts of time are spent in their composition. Really thoroughgoing reform here will have to await the development of clear decisional standards by way of generic rules and landmark opinions. Once the number of issues to be discussed becomes smaller and more manageable, greater attention can be paid to juristic art, literary form, brevity, and the desirability of speed.

114/ Under present procedures, weeks and sometimes months may be spent in finding the right answer to that two thousand dollar question.

But much can be done right now. Indeed, something has already been done. Until recently the Commission's opinions traversed all of the ground that the administrative law judge had covered. That was standard, even where the Commission was affirming both the result and the rationale. Today such cases are disposed of in a few lines. The saving of time is appreciable. 115/

More will have to be done along these lines. The propensity for modifying initial decisions on points of little consequence will have to be curbed. Exhaustive de novo review of routine questions in routine cases is a luxury that neither the Commission nor the public interest can afford. It will have to give way to a practice of restraint pursuant to which the Commission acts collegially by separate written opinion only on those cases which are of major significance or which involve novel or otherwise important policy questions.

(H) EARLIER COMMISSION INPUT INTO THE OPINION WRITING PROCESS FOR DIFFICULT CASES---The practices in effect for the past several years require those drafting opinions and orders to guess at the result that the Commission wishes to reach. They have to prepare a finished document. When close questions that can legitimately be decided either way

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115/ When the Commission has been brief and to the point, few have complained. Courts often affirm summarily or on the opinion below. If the Commission is ever to catch up with its work, it will have to follow that example.

are present, opinion writers often have to prepare two or more versions of the proposed decision.

In difficult cases this process consumes a great deal of time. It also has a harmful effect on the literary quality of the drafts. They lack the elementary virtues of unity, coherence and emphasis because their authors do not know exactly where they are going and because the conditions under which they work lead them to write in a way that will enable them to save as much of the manuscript as possible in the event of a change in result.

Accordingly, I have directed the Office of Opinions and Review to begin its work on close, difficult, or unusually complex cases by preparing analytical discussion papers rather than finished draft opinions. These papers will be presented to and discussed by the Commission. Members of the advisory staff drawn from offices other than the Office of Opinions and Review will participate in the discussion and present their views. The Commisssion will then give its instructions. Under this procedure, those doing the drafting will know the end result to be achieved and the often futile intramural wrangling that now bedevils the writing process will be lessened.

But I must add a caveat. This procedure will initially be used sparingly--only in those cases where the Director of the Office of Opinions and Review considers it advisable. Experience may tell us that we should follow this procedure

as a general practice. For now, however, I am of the opinion that the more routine case will be handled more expeditiously by setting directly to the task of preparing a proposed opinion for the Commission.

(I) MORE USE OF ORAL ARGUMENT--The Commission's agendas are so crowded, the number of cases coming before it so great, that requests for oral argument are seldom granted. In the typical wholesale electric rate case an oral argument would lead only to a spate of oratory about matters seldom illuminated by speechmaking. But there are instances in which oral argument can do much to focus and to clarify both the precise nature of the questions to be decided and the considerations on which the answers turn.

In such circumstances oral argument can make for better and faster decisions. Recently the Commission has experimented with a novel type of oral argument in which a proposed draft opinion is first circulated to the parties so that the argument is structured around that draft. The results have been promising. When able advocates fire away in support of and in opposition to a proposed opinion, strengths, weaknesses, problems, and missing links that were not previously apparent are exposed. This experiment will be continued.

Indeed, as the Commission makes progress in freeing its agenda from the routine to concentrate on the truly significant, I would favor more resort to oral argument before the

Commission. I accept the argument that there is some benefit from the parties' standpoint in being able to "look the decisionmakers in the eyes". As a Commissioner, I also admit that I learn things from oral presentation that are difficult to gleen from the cold written record. But there is a limit to the time as well as the sagacity of Commissioners. Accordingly, we must first create opportunities to be more deliberative before we can in fact become so. That is what makes the appellate restraint policy described above so important.

(J) AN EXPERIMENT WITH RATEMAKING BY RULEMAKING--
Trial-type hearings are traditional in ratemaking. Save for the fact that much of the evidence is in written form, the typical administrative rate case has much in common with the typical civil action in the courts. Facts are developed by direct examination and by cross-examination. The administrative law judge functions in much the same way as the trial judge does in the judicial sphere. The Commission itself can be viewed as an intermediate appellate court, with the the Court of Appeals and ultimately the Supreme Court having the last word.

Many think slavish adherence to the judicial model a mistake. They believe that regulatory commissions can work faster and better with all-paper records. More than forty years ago the late Professor Ray A. Brown of the University of Wisconsin Law School wrote:

> "The...principle of the leading cases... is that the parties to the proceeding are not to be adjudged on evidence unknown to them, but that they are entitled to hear such evidence, so that they may rebut or explain it. It does not follow, however, that to safeguard these rights such evidence must necessarily be presented at open hearing by the usual method of oral testimony and by tedious and often futile cross-examination of the witnesses. In criminal actions and in civil damage suits before a jury, there is often sharp conflict as to fact occurrences lying within the customary experience of ordinary men. There is also an undoubted advantage in having the witnesses personally present before the triers of fact in order that the truth of the story which they are telling may be determined from their conduct and demeanor. Such situations are not, however, customarily presented to the public service commissions. On the contrary, the usual primary evidence is documentary in character, contained in the records of the utilities, in accounts of receipts and expenditures, in records of goods and passengers carried, in inventories, and in valuations based thereon. The usual conflict arises from the...deductions which accountants, engineers, and rate experts attempt to draw therefrom. Material of this character is best presented not by the transitory oral utterances of witnesses, but in the form of written documents and reports, which the adjudicating tribunal should be given ample opportunity to analyze and appraise for relevance and cogency. It is desirable that a procedure be devised which will meet the exigencies of this situation." 116/

Others take a different view. They consider cross-examination a great engine of truth that is as effective in the administrative forum as it is in the judicial arena. They point out that "Cross-examination of an expert will

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116/ Brown, Public Service Commission Procedure -- A Problem and a Suggestion, 87 U. Pa. L. Rev. 139, 159-160 (1938).

sometimes prove revealing even if it does not show falsification or yield self-contradiction." 117/ A comment by one of the Commission's most experienced administrative law judges is worth noting in this connection. Judge Joseph Zwerdling, who was until recently the Commission's Chief Administrative Law Judge, has observed that, "An effective cross-examination can bring to life for the weary presiding examiner the nub of the controversy in a way that weeks and months of lonesome reading of the undiluted mass of written material could not possibly achieve." 118/

But it does not follow that cross-examination is needed in every case or with respect to every issue in a case.

Why force people to go to the expense of a live hearing when they are amenable to a decision on a paper record? Decisions on paper records have long been commonplace at the Interstate Commerce Commission and at the Department of Agriculture. 119/ I believe it is time to experiment with

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117/ Spritzer, Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices, 120 U. Pa. L. Rev. 39, 96 (1971).

118/ Zwerdling, A Plea for Clemency for Cross-Examination, 57 A.B.A.J. 45, 47 (1971).

119/ Forty years ago these experiments evoked favorable comment from the Attorney General's Committee on Administrative Procedure. Report of the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong., 1st Sess., 69-70 (1941).

them here. 120/ In saying that, however, I wish to quickly emphasize the word "experiment". I do not think it wise to make a large scale commitment to this process but only to test it to see if it will produce superior results. I have my doubts. Nevertheless, I accept the obligation to explore all realistic avenues of approach to recovering control of our ratemaking responsibility.

That experiment could take several forms. The most conservative would be one in which the present adjudicatory format is retained but in which the administrative law judge largely decides the case on a paper record, reserving for hearing only those matters which the parties or staff are able to demonstrate require (or would benefit from) cross-examination and an opportunity to offer live rebuttal evidence. A more radical break with tradition would involve resort to the Administrative Procedure Act's rulemaking provisions. Section 403(c) of the Department of Energy Organization Act permits this.

Some are skeptical about what this would accomplish. Others are more hopeful. The only way to find out is to try. Should experiments along this line show promise, something valuable will have been learned.

120/ Perhaps we should start with increases of less than $200,000 -- the newly proposed benchmark for distinguishing minor cases.

CHAPTER VIII

VIII. PRICE SQUEEZE: A SPECIAL PROBLEM FOR ADMINISTRATION

This report is to include an examination of the legal requirements and administrative procedures for the purpose ". . . of improving procedures designed to prohibit anti-competitive or unreasonable differences in wholesale and retail rates, or both". I read this as a direction to report on the so-called price squeeze problem. What can be done to avoid it or improve the administrative handling of cases in which it is at issue?

Previous parts of this paper have defined price squeeze and its legal roots. 121/ Here I will limit my discussion to a report on what steps the Commission has taken to carry out the Court's mandate in Conway.

Some nine months following the Conway decision, the FPC adopted a Statement of Policy. 122/ The objective was "... to obtain greater clarity, expedition and predictability for the resolution ..." of price squeeze issues.

However, that Statement was tentative. The FPC was concerned that premature establishment of formal rules would

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121/ See earlier discussion in Chapters IV and V.

122/ Order No. 563, issued March 21, 1977 and Order No. 563-A, issued May 20, 1977, in Docket No. RM76-29, promulgating 18 CFR §2.17. The final product resulted from the joint efforts of the FPC and the National Association of Regulatory Utility Commissioners.

too much delimit the consideration of price squeeze issues. It announced that issuance of formal rules would be withheld until there had been an opportunity to review what factual patterns might develop in the trial of price squeeze issues before the Commission. That was over two years ago.

A number of cases involving price squeeze issues have now been presented to the Commission for decision. Drawing from its experience with these cases, the Commission has attempted to restate and clarify its policies and procedures on this matter. That effort has taken form in two proposed rulemakings, one dealing with substantive price squeeze issues and one that would establish procedures by which the substance would be considered. 123/ These proposals codify concepts developed through case-by-case adjudication. They also propose other rules of broader applicability.

The significant procedural development is the establishment of phased proceedings in these cases. All cost of service issues would be disposed of in the first phase or phases. Price squeeze issues would be reserved for a subsequent phase.

Phasing has been ordered for all but the most unusual cases because it has become clear that the simultaneous litigation of price squeeze issues and the traditional cost of service issues usually prolongs a proceeding at virtually

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123/ Notices of Proposed Rulemakings in Docket Nos. RM79-79 and RM79-80, issued November 19, 1979.

every stage -- all to no purpose if the Commission's final opinion moots the price squeeze question. If a customer feels that an unjustified disparity remains following issuance of a "cost of service phase" Commission order establishing a preliminary just and reasonable rate, the customer is permitted to reallege price squeeze and the proceeding continues.

Phasing may prolong those proceedings in which price squeeze remains an issue. But it will shorten those in which the issue drops out. Experience to date suggests that there will be a net time saving. In any case, the Commission has proposed that where a subsequent price squeeze inquiry is made, the customers will get interim rate reductions and refunds down to the just and reasonable but for price squeeze level. So the putative "squeezees" will get an appreciable measure of relief long before the end of the case.

Two substantive points are worth noting. In one of the first cases presented to it for decision, the Commission determined that no showing of intent to discriminate needs be made in order to establish a price squeeze claim. 124/ This holding should greatly reduce the amount of discovery invested in search of evidence of an intent to price discriminate for competitive advantage. On the other hand, no longer discouraged by the need to make such an inquiry or showing,

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124/ Missouri Power & Light Co., Opinion Nos. 31 and 31-A, issued October 27, 1978 and May 16, 1979, respectively.

customer's counsel may choose to raise and pursue this issue in circumstances in which he or she had not in the past. The Commission will search for other ways consistent with due process to discourage frivolous claims of price squeeze.

The Commission has also made it somewhat easier for a purchaser or the staff to show that the wholesale supplier and purchaser are in competition with each other. Before these changes, there was often protracted discovery, hearing, and briefing on this question. The Commission determined 125/ that the price squeeze case could go forward when an intervenor or staff showed that a utility and its wholesale customer were in close physical proximity and each had the ability to serve new customers or increased loads of existing customers. Such a showing would be sufficient to establish the existence of competition unless the wholesale supplier could disprove it. The Commission further set out the rebuttable presumption that price discrimination between a wholesale customer and a retail customer or class of customers with which the wholesale seller and buyer were in competition had an anticompetitive effect. The consequence of this treatment of competition, together with the elimination of intent as a requisite element in price squeeze, should be to focus much of the parties' and the

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125/ Connecticut Light and Power Co., Order Reversing Administrative Law Judge's Dismissal of Price Squeeze Allegations for Failure to Prove a Prima Facie Case, and Order Denying Rehearing, issued August 20, 1979, and December 10, 1979, in Docket No. ER78-517.

Commission's attention and efforts on the showings of price discrimination. As the Commission is able, it will carve out for disposition issues subsumed within the larger issue of discrimination. The developing precedent will establish guidelines instructive to the parties and the Commission staff. Ultimately the issues will narrow. But in good conscience I must acknowledge that it will be a long process before these cases can legitimately be called "manageable".

CHAPTER IX

IX. WHAT MORE SHOULD THE CONGRESS DO?

(A) LEGISLATIVE CHANGES

Given a greater sense of urgency on the part of both the Commission and its staff than has been present in the past and a modicum of luck, there is good reason to believe that the delay problem can be substantially alleviated by administrative measure.

However, should the Commission be engulfed in new torrents of filings, it may have to run very fast in order to remain in the same extremely unsatisfactory place in which it now finds itself. I must note in this connection that I know of no informed observer who sees any imminent prospect of lower prices for electricity. Even if we should succeed in subduing the inflationary forces that now beset us, the relative price of electric power seems certain to rise. Debt incurred when interest rates were low will have to be refinanced at interest rates that would have been considered unbelievable and usurious a few years ago. Plants built when construction costs were a mere fraction of what they now are will have to be replaced at 1985, 1990 and 1995 prices. Capital costs, fuel and other operating costs -- the stuff of which electric rates are made -- are all headed upward.

This means that so long as the Commission's jurisdiction reaches practically every wholesale electric rate in the land

and so long as the Federal Power Act permits rates to go into effect before the Commission has had a fair opportunity to pass on their legality:

(1) Wholesale purchasers will pay excessive rates -- They may not have to pay them for quite so long as they now do, but they will have to pay them for periods that may sometimes be fairly lengthy;

(2) In the words of Section 207(b) of the Public Utility Regulatory Policies Act "successive rate increases [will be imposed and collected] before they have been determined by the Commission to be just and reasonable and otherwise lawful," -- They may be less frequent and fewer in number, lasting for shorter periods; but they may still occur; and

(3) Little of real consequence can be done "to prohibit (emphasis supplied) anticompetitive or unreasonable differences in wholesale and retail rates, or both." 126/ Only prospective correction for the problem may be achievable -- and that may not be enough. 127/

126/ The quotation is from Section 207(b).

127/ The last point deserves special comment. As noted earlier, "price squeeze" allegations are now standard in wholesale electric rate litigation. When the truth of these allegations is established, the Commission can make a correcting adjustment in the rate and order refunds. That is not the most effective remedy

(Footnote continued on next page.)

As noted above, we can do much to improve things. Indeed, if we are in fact successful in bringing under reign a process which previously required three to four years to now arrive at a conclusion in as little as 12 months, we will have accomplished a great deal. But we cannot solve the problems. To do that, to attack the wholesale electric syndrome (excessive rates unilaterally imposed by the wholesalers, the "pancaking" of one such rate on top of another, and persistent anticompetitive

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127/ (Footnote continued from previous page.)

imaginable. The wholesaler is free to make another rate increase filing that will become effective before the Commission has a chance to pass on it and that may create a new problem. Indeed, the new rate may already be in effect; the anticompetitive impact re-established. Assume, for example, that the Commission issues an opinion on October 1, 1979, correcting a squeeze. What is the real efficacy of that correction if a new rate went into effect at the beginning of 1979 creating a new and an even worse situation?

I make these observations with some degree of unease. The Commission has determined that we should not look to the proposed rate to determine price squeeze, rather we should compare the rate that would otherwise have been approved (what we are calling the just and reasonable rate but for adjustment for price squeeze). See Arkansas Power & Light, Order Accepting for Filing and Suspending Proposed Rate Changes, Granting Intervention, and Establishing Hearing and Price Squeeze Procedures, issued August 6, 1979, and Southern California Edison, Opinion No. 62, issued August 22, 1979. At least in part our rationale is grounded on the view that we can only correct the rate prospectively and order refunds. The Act does not appear to contemplate our making an adjustment to approved rates to compensate for harm incurred during the pendency of the case resulting from the collection of an excessive rate. The potential for such harm seems to be inherent in a statutory scheme which permits rates to take effect prior to approval. This is true whether the harm was a competitive one or whether it was a consequential damage of some different nature. Civil remedies may be available but not administrative ones.

differences between retail and wholesale rates) at its roots, statutory change would be required.

The disease would disappear if the Federal Power Act precluded any rate from going into effect until the Commission had first found it just, reasonable, and otherwise lawful. I am not prepared to recommend this course, however, nor do I think it would be a responsible course for the Congress to follow.

Fairness to the wholesalers as well as sound national energy policy would require that provision also be made to provide some rate relief during the pendency of the proceeding. Investor-owned companies should not be required to wait for years until the Commission is able to conclude its processes. Were that the law, the balance would tilt much too heavily in the favor of the customer's near term interest in low rates (to the detriment of the customer's longer term interest in adequate and reliable electric service). Delay would become an unalloyed blessing for those resisting rate increases. And the investor-owned companies' retail customers (and we must never forget that the overwhelming majority of American households and businesses belong to that class) would be subsidizing the wholesale customers.

To avoid such a state of affairs and to enable the Commission to respond to the wholesalers' just claims, the Federal Power Act would have to be made much more flexible than it now is.

Some States appear to have had success with a procedure which permits an interim "make whole" rate 128/ to be collected while the full case is adjudicated. Perhaps this could be employed at the Federal level. But I have my doubts.

I am concerned that in this highly litigious field the battle will be joined in determining the interim rate and appeals would be taken to that decision challenging both the criteria and/or the procedures employed to arrive at the interim rate to be in effect during the balance of the litigation. Is the Congress likely to give the Commission broad discretion in fashioning both the interim rate and the procedures, if any, to be employed for its development? If not, the statutory change may cause more mischief than leaving the present situation alone with all of its known shortcomings. Otherwise we may merely compound the difficulties by making two cases out of every one, each with its own standards and procedures.

Also, principles of fairness may suggest that any revision of the statutory scheme be accompanied by resting discretionary authority in the Commission to direct retroactive adjustments.

Suppose that after a full hearing the Commission's review of the whole record convinces it that it was much too grudging

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128/ For these purposes, in using the term make-whole rate I have in mind a rate which accepts the cost of service principles arrived at in the previous case which approved the currently effective rate and adjusts the revenue level to permit the utility to more nearly realize the rate of return level previously authorized.

at the outset of the case and that the interim increase should have been appreciably higher than it was. Would not a retroactive boost in the interim rate at the end of the case serve the ends of justice? Let us now look at the reverse situation in which a study of the whole record shows either that the interim increase was overly generous or that no interim increase at all should have been given. Why should the Commission be powerless to order refunds in that situation?

As I hope the foregoing discussion illustrates, any change in the present statute must be done carefully. There are important and difficult tradeoff questions involved. Such is the proper grist for the legislative mill. That is, if Congress chooses to pursue this matter further. 129/

There are, however, some statutory changes of a more limited nature which I am prepared to suggest. These involve:

(A) The Commission's power to delegate final decision-making authority to its employees; and

(B) Rehearings of the Commission's orders.

Students of the administrative process agree that the agencies cannot cope effectively with the torrents of business that come before them unless the people at the top can delegate to their staffs final decision-making responsibility. Most

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129/ The crafting of such a legislative modification is beyond the scope of this paper. I have pondered a number of alternative schemes and found none which is entirely satisfactory.

Federal regulatory agencies have this power. Unfortunately, the Federal Energy Regulatory Commission lacks it in important facets of its jurisdiction. The Federal Power Act is one of these.

Hence whenever the Commission delegates a function to its staff, it must under present law provide for a right of appeal to the Commission itself. The result is that delegation is, as a practical matter, confined to spheres that are unlikely to be controversial. To extend it to other areas would merely add another layer to a decisional process that already has too many layers.

What the Commission needs is express statutory authority to delegate functions and responsibilities to its employees and to provide that the decisions made pursuant to such delegated authority shall be deemed to have been made by the Commission itself.

That would enable the Commission to delegate to a single Commissioner or staff officer the suspension decision, the first of the three decisions required in current proceedings. This step alone would free the Commission from acting collegially on as many as 120 to 190 matters over a year's time. 130/

130/ I do not suggest that these cases are petty. On the contrary, they are often of considerable significance to the utility and the affected customers. But when that significance is unaccompanied by a more general significance, the justification for mandatory review by the full Commission seems dubious. So long as everything has to be passed on by the Commission, matters are bound to move slowly.

Moreover, the remainder of the decision process would benefit from this simple step.

Once liberated from the detail of these largely interim decisions, the Commission would be able to better focus on the decisions of greater significance -- the final determinations of its ALJ's -- and on policy. Such matters could be dealt with more searchingly and above all more expeditiously than is now possible.

Now for rehearing. The Federal Power Act provides that "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon." 131/ At first blush this seems innocuous.

Indeed, it appears salutary. Decision-makers err. And litigants are indefatigable. Why not give the Commission an opportunity to reconsider and to correct its errors before subjecting those errors to the gauntlet of judicial review?

I have no objection to applications for reconsideration and rehearing. One finds them everywhere in our legal system. And they serve the ends of justice. 132/

131/ Section 313(a) of the Federal Power Act (16 U.S.C. §825.1(a) (1935)); also see, Section 19(a) of the Natural Gas Act (15 U.S.C. §717h(a) (1935)); and Section 506 of the Natural Gas Policy Act (92 Stat. 3404, to be codified at 15 U.S.C. 3416 (1978)).

132/ However, the Commission's experience shows that when such applications become standard, they become an intolerable clog in the decisional machinery.

However, the rehearing provisions of the statutes that the FERC administers have two peculiar features:

(1) They generally require those aggrieved by the Commission's decisions to seek rehearing before the Commission as a condition precedent to judicial review.

(2) They may be read to permit applicants for rehearing to inject new issues.

These features have some undesirable consequences. Because one cannot go to the Court of Appeals without having first sought rehearing before the Commission, one who seeks to challenge some basic Commission position or doctrine has to go through an expensive, a time-consuming, and an essentially ritualistic rehearing procedure. 133/ It would be a far better procedure to give the Commission the option to waive rehearing before the Commission. This would permit the Commission to allow direct appeals to the Court of Appeals in cases where nothing more is likely to be gained on rehearing or where early

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133/ Note also that the statutory provisions with respect to rehearings can be read (incorrectly, I believe) to refer to any order issued by the Commission. Hence, practitioners before the Commission frequently seek to relitigate interlocutory as well as final decisions. The Commission's Rules of Practice have sought to curb this. See 18 C.F.R. §1.34(a). But the attempt has been unsuccessful. "Rehearing" and "reconsideration" has become a way of life here. Bizarre requests for rehearings and reconsiderations of reconsiderations are by no means uncommon. I know of no parallel to this phenomenon in any other forum.

judicial action is desirable. Similarly the Commission could reserve rehearing for cases in which it believes it might be helpful or where it is particularly important to guard against error.

If, as one reading of the Act would have it, there is no limitation on the nature of the contentions that can be put forward in support of an application for rehearing, facts and arguments can be unveiled for the first time in that paper. Such a practice undercuts all that has gone on before in a case. To avoid risking reversal the Commission often feels obligated to respond to the new matter.

Thus old cases drag on interminably. And new ones cannot be dealt with expeditiously, because both the Commission and its decisional employees are tied up with reconsiderations and rehearings. I cannot believe that the architects of the statutory rehearing provisions intended this. But they achieved it. 134/

134/ They also created an environment that has a detrimental impact on the quality of the Commission's work product. If rehearing is a virtual certainty in every contested case of any consequence, the Commission and its decisional employees have a tendency to take its opinions less seriously than they might otherwise. Human nature being what it is, the result is a pernicious "Let it go for now. We'll fix it on rehearing" frame of mind. This does not make for juristic craftsmanship. The result is a vicious circle in which the existence of the rehearing provisions tends to spawn the kind of error prone decision-making that those provisions were intended to correct. We have been working to avoid being drawn into this spiral. We have achieved only modest success.

Accordingly, I urge that the Commission be permitted to waive rehearing provisions of the Federal Power Act in appropriate cases or with respect to designated classes of orders, 135/ and that the Commission be freed to promulgate such rules and to adopt such policies with respect to rehearing and reconsideration as it thinks appropriate.

(B) WHAT OF JURISDICTION?

There is much to be said for the view that the problems to which this document is addressed stem in the main from the breadth of the Commission's wholesale electric rate jurisdiction.

If that be so, why not go to the root of the matter? Why should the rates that an Illinois wholesaler charges Illinois retailers for power to be consumed in Illinois continue to be set in Washington? That is a good question and an important question.

I make no recommendations in this area. But I do think it my duty to summarize the clashing considerations as I see them.

135/ If the Congress is willing to undertake this action, it should also consider making waiver possible under the Natural Gas Act and the Natural Gas Policy Act of 1978. I would think the arguments would be equally valid, the benefits the same. I recognize, nevertheless, that amendments to the Natural Gas Act and the Natural Gas Policy Act take on a particular significance in the Congress. I would not want the Congress to defer acting on this amendment to the Federal Power Act on the belief that a broader multi-statute change was being sought.

The table below does that.

The Case for Jurisdictional Status Quo	The Case for Jurisdictional Deflation
(1) Wholesale electric rate regulation is a very special kind of regulation. It involves far more than rate-setting. It deals also with maintaining and encouraging competition in a vital and on the whole a monopolistic industry. That is a Federal, not a local interest. If that interest is to be served, Federal regulation with review in the Federal courts, which are far more sensitive to and much more knowledgeable about competitive relationships than their state counterparts, is essential. Of course, this involves costs that would not otherwise be incurred. But if the nation is really serious about its oft-repeated rhetorical commitment to competition, it must conclude that those costs are outweighed by the benefits to which I referred at the outset of Chapter IV.	(1) The status quo is ludicrously wasteful. It means that questions about rate base, rate of return, and other cost of service items that have been litigated and decided in Madison, in Albany, in San Francisco, and in Atlanta have to be relitigated and redecided in Washington. The diseconomies are obvious. In spite of all the talk about its impact on competition, wholesale electric rate regulation is at bottom electric rate regulation. It does not differ basically from retail electric rate regulation. Moreover, the bifurcated jurisdiction of today is actually anti-competitive. The price squeezes and the rate disparities of which the wholesale customers complain stem in the main from the dual regulation of which some of their spokesmen appear enamored. If the state commissions set both wholesale and retail rates, they would have to be mad with anti-public power prejudice in order to countenance the disparities engendered by dual regulation. There is no reason to believe that this would happen frequently. If it did happen now and then, the antitrust laws would provide Federal remedies.
What may or may not have been intended in 1935 at the bottom of the Great Depression is really beside the point in 1980. The important thing is the contemporary function of wholesale electric rate regulation. As Professor Alfred E. Kahn has said, that function is "to employ regulation to preserve the competition possible in this	

The Case for Jurisdictional Status Quo	The Case for Jurisdictional Deflation
industry -- by guaranteeing municipal distributors and coops access to low-cost, pooled power at minimum rates." 136/ Also it is important to preserve the broad reach of the Federal forum to permit the Commission to assemble expert staff and to enable it to perform a leadership role in the field of rate regulation, to bring new ideas to the forefront, to foster national interests through emergent regulatory policies on rate design and the like.	It is clear that the authors of the Federal Power Act did not intend all-pervasive Federal jurisdiction over wholesale rates. Factors that could not possibly have been foreseen in 1935 brought that result to pass. True, Congress re-examined the position after the Colton decision and took no action. At that time, however, there was no energy crisis. In the energy environment of today and of the foreseeable future, dual regulation is a costly luxury that the nation can no longer afford. Moreover, the Commission is so overwhelmed by its present case load it often has not the time to devote to important policy questions clearly within the Federal domain.
(2) The historical record of the states in the wholesale field does not inspire confidence. State commissions are retail-oriented. To get fair treatment wholesale buyers have to be able to go to an agency sensitive to their problems and immune from parochial local influences.	(2) The historical record pointed to in the opposite column is stale. The state commissions are now much more effective, far more sophisticated, and immensely more skeptical of the companies' claims than their predecessors were.

136/ 2 Kahn, The Economics of Regulation, 322 (1971). (Emphasis in the original.)

The Case for Jurisdictional Status Quo	The Case for Jurisdictional Deflation
(3) By channeling practically all wholesale electric rate cases to a single tribunal in a single place, existing law helps to rectify the imbalance in litigation resources between the wholesalers and their customers. If the customers had to litigate in 50 state capitals, they would be hopelessly outclassed by the investor-owned companies. Because all of the litigation is in the national capital, a Washington-based public power bar and an ancillary community of public power oriented experts has developed. This enables wholesale customers to get competent representation at costs that they can afford. Atomizing the jurisdiction among the states will take that away from the customers.	(3) The status quo requires long, expensive journeys to Washington to dispose of essentially local matters. It compels wholesale customers to come to Washington. The reasons for that are obscure. Why should wholesalers and retailers who wish to do so not be free to opt for state rather than Federal regulation? 137/
(4) True, the present arrangement makes for a heavy FERC electric rate caseload. It is also true that this means that decisions cannot be expected to issue as speedily as they would if the Commission's caseload were lighter or the world more ideal. But it does not follow that this jurisdiction should be eviscerated. That would be akin to expediting the disposition of criminal cases by abolishing most of the criminal law. The recommended reforms should enable the Commission to	(4) The United States is a very big country. And electric power is a very big industry. Hence there is little likelihood that a single agency in Washington will ever be able to regulate every wholesale electric rate in the land with any semblance of dispatch. Marginal improvements are all that can be expected from procedural reforms. The basic problem with the FERC's electric rate jurisdiction is its impossible breadth. That problem cannot be solved by creating a new agency. This

137/ In October 1978, I suggested that.

The Case for Jurisdictional Status Quo	The Case for Jurisdictional Deflation
keep its docket reasonably current. If those reforms do not work well because of the Commission's pre-occupation with its demanding natural gas duties, because of an upsurge in electric rate increase filings or because of other factors, consideration should be given to the creation of a new Federal agency that would deal solely with electric matters.	would be a mere change in labels. The new agency would inherit the FERC's folkways and the FERC's insoluble problems. No showing has been made that Federal control over the rates that the X Power and Light Company charges the Village of Y is worth the social costs that it imposes.

It is obvious from the foregoing that the jurisdictional issue turns on basic policy questions to which there are no easy answers.

Reasonable people can reasonably differ about the costs and the benefits of the existing jurisdictional arrangement. Hence the Congress may be reluctant to act in this area unless it is first demonstrated that the present problems will resist administrative reform and continue unabated. However, the jurisdictional issue should not be permitted to becloud the matters discussed in the preceding part of this chapter. The statutory changes there suggested are needed now. And they will be needed even if the scope of the Commission's jurisdiction should be reduced. Jurisdictional contraction would make the need for those changes somewhat less acute. But the need would still be there.

I end this report with the type of caveat usually placed at the beginning of such papers. Section 207 of PURPA called for a report of the Chairman of the Commission, not a report of the Commission itself. I was instructed to consult with the Secretary of the Department of Energy and this has been done. But the analysis, the conclusions and the recommendations are mine and mine alone.

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